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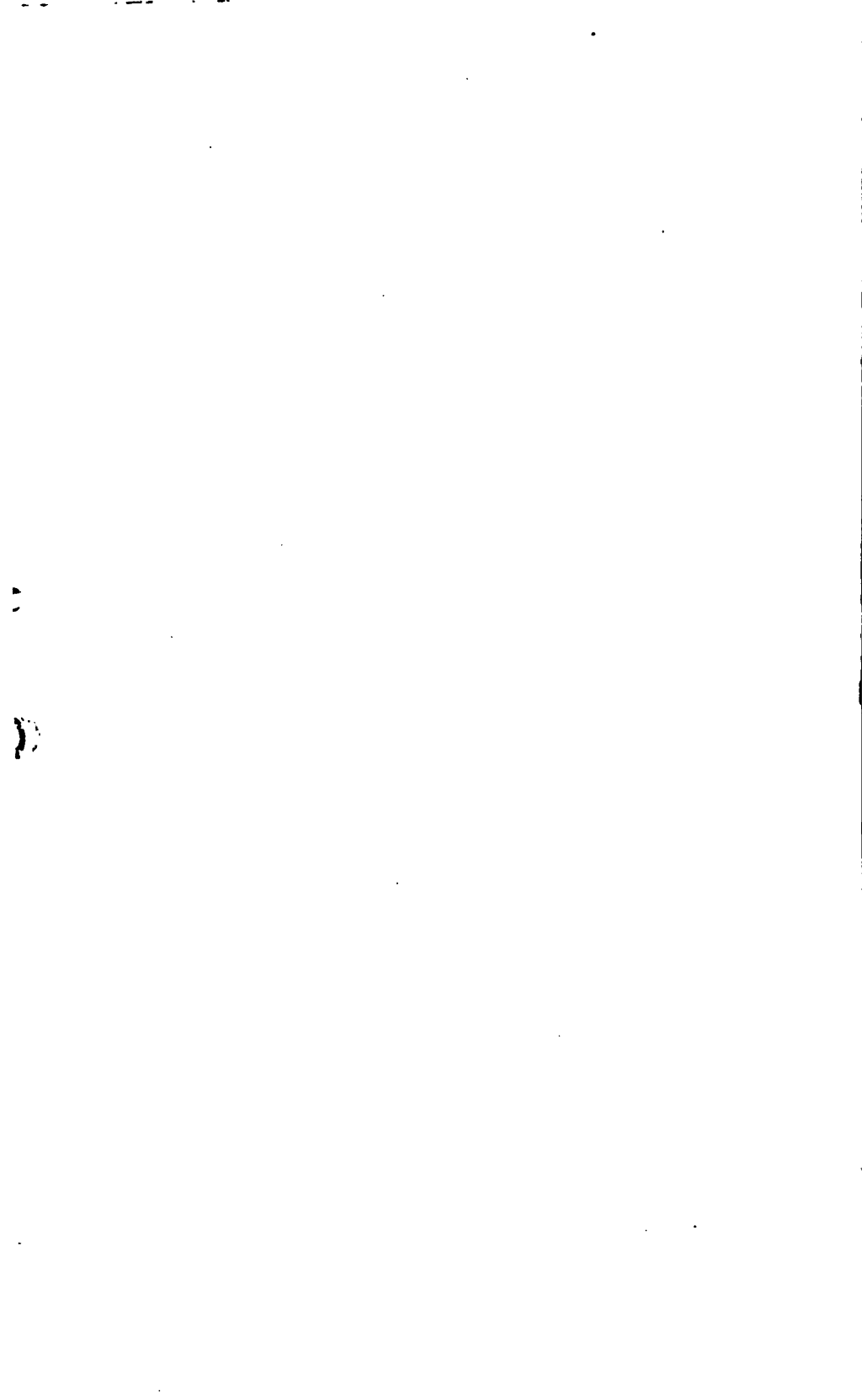
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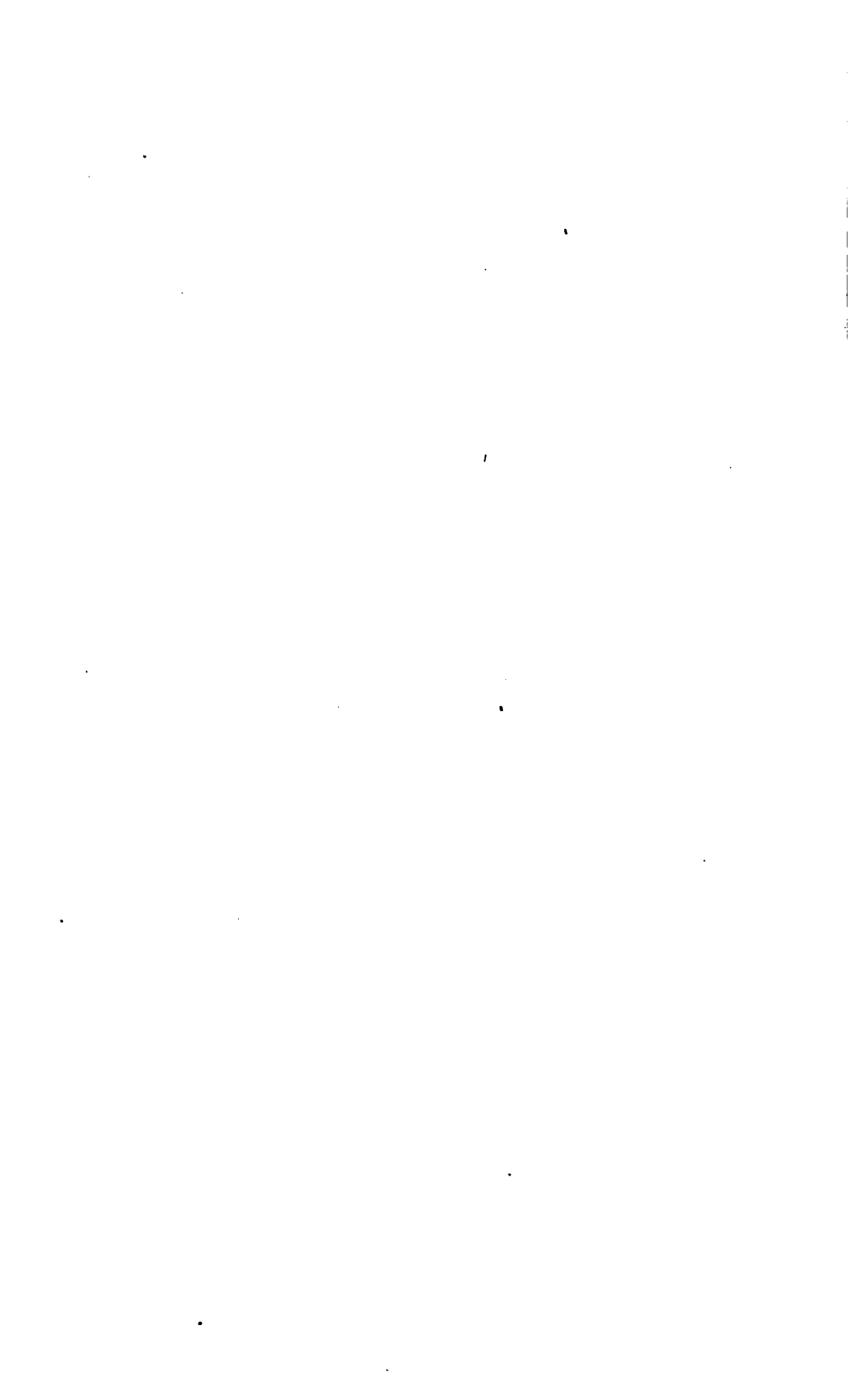


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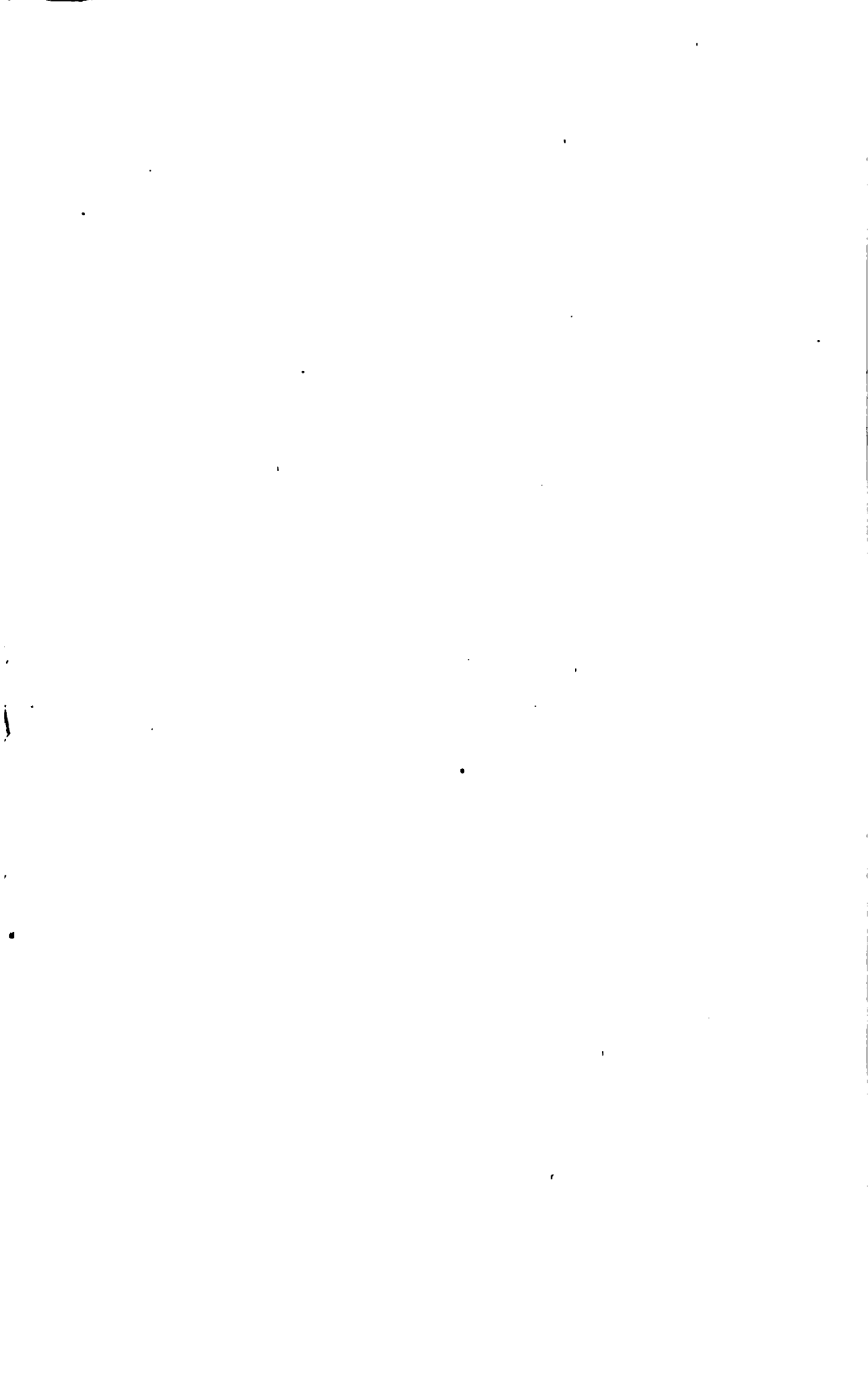
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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND AN INDEX.

BY JOHN W. KERN,
OFFICIAL REPORTER.

VOL. 102,

CONTAINING CASES DECIDED AT THE NOVEMBER TERM,
1884, NOT REPORTED IN VOLS. 98, 99, 100 AND 101,
AND CASES DECIDED AT THE
MAY TERM, 1885.

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JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE TIME OF THESE REPORTS.

HON. ALLEN ZOLLARS.*†
HON. JOSEPH A. S. MITCHELL.‡ §
HON. WILLIAM E. NIBLACK.†
HON. GEORGE V. HOWK.†
HON. BYRON K. ELLIOTT. ||

•Chief Justice at the November Term, 1884.

†Term of office commenced January 1st, 1883.

‡Chief Justice at the May Term, 1885.

§Term of office commenced January 6th, 1885.

||Term of office commenced January 3d, 1881.

OFFICERS
OF THE
SUPREME COURT.

CLERK,
SIMON P. SHEERIN.

SHERIFF,
JAMES ELDER.

LIBRARIAN,
CHARLES E. COX.

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1884, IN THE SIXTY-
NINTH YEAR OF THE STATE.

No. 11,223.

BRYSON v. MCCREARY.

SHERIFF'S SALE.—*Redemption of Real Estate.*—*Landlord and Tenant.*—*Rents, Right to.*—*Statute Construed.*—A. and wife executed a mortgage to B. in 1878, upon real estate. The mortgage was foreclosed and the land sold in 1880. The purchaser transferred the sheriff's certificate to C. A short time before the foreclosure, A. had given to his wife, for her own use, the rents of a mill situated upon the mortgaged land. Before the foreclosure also, the wife leased the mill to D. After C. became the owner of the certificate he notified D. to pay the rent to him, which he did thereafter. The land not having been redeemed, C. procured a sheriff's deed in 1882. Action by the wife against D. for the rent during the year allowed for redemption.

Held, that the redemption law of 1861, in force when the mortgage was executed, entered as a silent factor into, and became a part of, the contract between A. and B., and that a subsequent law will not be allowed to materially alter or affect their rights under the contract.

Held, also, that under the redemption law of 1861, the tenant, D., would not have been liable to C., but to the wife, for the rent; but under the redemption law of 1879, D. was liable to C.

Held, also, that the liability of D. was fixed by the law of 1879, and under that law he was liable to C., the owner of the sheriff's certificate, and not to the wife of A. That law made him the tenant of C.

109	1
127	264
102	1
129	163
129	179
102	1
138	689
102	1
145	639
102	1
151	632
151	633
151	634
102	1
155	149
156	701
102	1
164	94

Bryson v. McCreary.

SAME.—*Object of Redemption Law of 1861.—Receiver.*—The main object of the redemption law of 1861 was to enable the judgment debtor, by the use of the rents and profits, to redeem his property, and at the same time save the purchaser from loss, and hence the proviso that if the premises were not redeemed, the judgment debtor should be accountable to the purchaser for the reasonable rents and profits; and hence, too, the rulings that in certain cases a receiver would be appointed to collect the rents and hold them for the purchaser in case the premises were not redeemed.

SAME.—*Redemption Law of 1879.*—The main object of the law of 1861 was accomplished by the law of 1879, by requiring the judgment debtor, if he occupied the premises and did not redeem, to account to the purchaser for the reasonable rents, and by allowing the purchaser to collect the reasonable rents in the first instance from other occupants of the premises, and keep them if the premises were not redeemed, and if they were redeemed, to allow a credit on the judgment for the amount collected. This additional authority on the part of the purchaser to collect the rents operated in the way of security.

SAME.—*Statute of 1879 does not Violate Obligation of Contracts.—Constitutional Law.*—The redemption law of 1879 did not violate the obligations of the contract between A. and B., but secured its more faithful performance. It may be, therefore, more properly styled a statute affecting and providing a more efficient remedy for the enforcement of the contract between the parties.

SAME.—*No Vested Rights in Laws or Legal Remedies.*—There are no vested rights in the laws generally, nor in legal remedies, and hence changes therein by the Legislature do not fall within the constitutional inhibition, unless they are of such a character as to materially affect the obligation of contracts; and hence, too, laws which merely afford the means for a more efficient enforcement of a contract do not impair its obligation, and are valid.

From the Switzerland Circuit Court.

W. D. Ward and T. Livings, for appellant.

J. A. Works and J. D. Works, for appellee.

ZOLLARS, C. J.—The pleadings present this state of facts: George W. Bryson, appellant's husband, being the owner of real estate, and indebted to one Harris, in 1878, appellant joining, mortgaged the real estate to Harris to secure the indebtedness. On the 16th day of March, 1880, the mortgage was foreclosed, and on the 24th day of April, 1880, the real estate was sold for the full amount of the judgment, and was

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worth that amount. The purchaser, for value, transferred the sheriff's certificate to one Thomas F. McCreary. A short time before the foreclosure, the husband had given to appellant, for her own separate use and maintenance, the use and rents of a mill situated upon and a part of the real estate sold under the decree. On the 10th day of March, 1880, which was also before the foreclosure, appellant leased the mill to appellee at a stipulated rent. After Thomas McCreary became the owner of the sheriff's certificate, he notified appellee to pay the rent to him and not to appellant. The real estate not having been redeemed, Thomas F. McCreary received the sheriff's deed in 1882. Up to the time of the notice, appellee paid the agreed rent to appellant. Subsequent to that notice, he paid the rent to Thomas F. McCreary.

Appellant instituted this action to recover from appellee the amount of the agreed rent during the year allowed by law for redemption.

Is she entitled to recover, as against appellee, and against the claims of Thomas F. McCreary? Appellant's contention is that her rights are to be determined under the redemption law of 1861, 2 R. S. 1876, p. 220, because the mortgage was executed while that law was in force, and before the redemption law of 1879, Acts 1879, p. 176, took effect, and that to apply the latter law would bring it in conflict with section 10, of article 1, of the Constitution of the United States, which prohibits the States from passing laws impairing the obligation of contracts, and section 24 of the bill of rights in the Constitution of the State which also prohibits the passage of any law impairing the obligation of contracts. Appellee contends that the rights of the parties must be settled under the law of 1879, and that under that law appellant can not recover. Both acts provided that the owner of real estate sold on execution, and other persons named, might redeem the same within a year after the sale. Upon the subject of possession during the year, and the liability for rents, the act of 1861 provided as follows: "The

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judgment debtor shall be entitled to the possession of the premises for one year after the sale, and in case they are not redeemed at the end of the year as provided in this act, he shall be liable to the purchaser for their reasonable rents and profits." The rulings under this statute, and in the interpretation of it, may be classed as follows:

1st. Neither the tenant nor grantee of the judgment debtor, nor any one else except the judgment debtor, could be held liable to the execution purchaser for the rent of the real estate during the year allowed for redemption. *Clements v. Robinson*, 54 Ind. 599; *Powell v. DeHart*, 55 Ind. 94; *Murphy v. Teter*, 56 Ind. 545; *Wilson v. Powers*, 66 Ind. 75; *Graves v. Kent*, 67 Ind. 38; *Ridgeway v. First Nat'l Bank*, 78 Ind. 119.

2d. The rents and profits of the real estate were the property of the judgment debtor, and he might rent the property and collect the rents; they might be levied on and sold as his, or he might assign them or otherwise dispose of them. In either of which cases the execution purchaser could not recover against the tenant, purchaser or assignee of the rents. *Ridgeway v. First Nat'l Bank*, *supra*; *Favorite v. Deardorff*, 84 Ind. 555.

3d. Having collected the rent during the year allowed for redemption, the judgment debtor did not hold them either as the tenant or trustee of the execution purchaser. *Ridgeway v. First Nat'l Bank*, *supra*.

4th. On the other hand, it was held that if a tenant, or the heirs of an insolvent owner of real estate, who was the judgment debtor, were in possession of the real estate, and the property was not sufficient in value to pay the judgment, or was going to waste, and taxes were delinquent, a receiver might be appointed to collect the rents during the year allowed for redemption, and hold them to be paid to the execution purchaser in case the real estate should not be redeemed. *Connelly v. Dickson*, 76 Ind. 440; *Brinkman v. Ritzinger*, 82

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Ind. 358; *Travellers Ins. Co. v. Brouse*, 83 Ind. 62; *Buchanan v. Berkshire Life Ins. Co.*, 96 Ind. 510.

5th. And so it was held, that if the judgment debtor had made an assignment under the voluntary assignment law, the assignee might be compelled to pay over to the execution purchaser the rents that he might have collected during the year allowed for redemption. *Davis v. Newcomb*, 72 Ind. 413.

6th. And so, too, it was ruled, that in case the judgment debtor did not redeem, he was liable to the execution purchaser for the rents and profits, regardless of the statutory liability; that an action would lie at common law, and under 2 R. S. 1876, p. 342, section 14, which provided that "The occupant without special contract, of any lands, shall be liable for the rent, to any person entitled thereto." This was based upon the idea that the title of the purchaser by the sheriff's deed relates back to the time of the sale. *Gale v. Parks*, 58 Ind. 117.

It is difficult, if not impossible, to harmonize the reasoning in these several classes of cases. None of them have been expressly overruled. There has been an effort, rather, to distinguish and limit. The reasoning in some of them, however, has been approved, and again condemned.

In the case of *Gale v. Parks*, last above, it will be noticed that no reference is made to the earlier cases. This case is not referred to in the case of *Wilson v. Powers*, *supra*, but it is there held, citing the earlier cases, that there is no liability except as fixed by statute, and that under the statute no one except the judgment debtor was liable to the purchaser for the rents.

In the case of *Graves v. Kent*, *supra*, the case of *Gale v. Parks*, *supra*, is referred to, and while there is an effort to distinguish, the ruling is contrary to the doctrine of it. In the case of *Davis v. Newcomb*, *supra*, the case is cited and approved. Again, in the case of *Ridgeway v. First Nat'l Bank*, *supra*, an effort is made to distinguish and limit the case, but the doctrine of the case, that the purchaser may recover on

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the doctrine of relation, is strongly combatted and repudiated by a majority of the court: So far as the case holds that the execution purchaser might recover independently of the statute, it should be regarded as overruled by the above cases.

In the case of *Davis v. Newcomb*, *supra*, conceding that under the cases the possession of the judgment debtor could not be disturbed, and that he had the right to dispose of the rents, it was held that the execution purchaser, as against other creditors, was entitled to the rents collected during the year allowed for redemption, by the assignee of the judgment debtor under the voluntary assignment laws. It was said: "And, it being settled that the title related back to the date of the sale, it is a necessary corollary that the money in dispute is and must be regarded as being the proceeds of lands which belonged to the appellants at the time they accrued."

The case of *Connelly v. Dickson*, *supra*, was an application by the execution purchaser for the appointment of a receiver to collect the rents during the year allowed for redemption. The real estate was occupied by a tenant of the judgment debtor. This court held that a receiver had been properly appointed, and that the order to him, after the expiration of the year for redemption, to pay over the rents to the execution purchaser, was a proper order.

Mr. Justice WOODS, in the closing portion of the opinion, said: "We are not, however, to be understood as meaning that a receiver may be empowered to disturb the actual possession of the owner, or of his tenants occupying under contracts made in good faith. Our decision is, that, where it is shown, as in this case it is shown, that the property is in the hands of a tenant, who is under contract to pay a stipulated rent, which has not been paid to the judgment debtor or the owner of the land, and that the latter is insolvent and can not redeem, the court may appoint a receiver to collect such rents, and to hold the same until the end of the year, if a redemption be not sooner made, to be paid over to the debtor, if he redeems, and otherwise, to the purchaser."

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After an extended examination of the statute of 1861, in all of its bearings, it was held in the case that "the true meaning of the law may be expressed as follows: 'The purchaser shall not be entitled to the possession of the premises for one year after the sale, but in case they are not redeemed at the end of the year, as provided in this act, the owner or occupant shall be accountable to him for their reasonable rents and profits.'" To the writer of this opinion, this interpretation of that statute seems to be the proper one, and the reasoning which led to it strong and convincing.

It will be observed that the action was not for a personal judgment against the tenant. For this reason the case has been held to be distinguishable from the other cases where the question of personal liability was involved. But if the interpretation of the statute is the correct one, it would seem to follow that the owner in possession, whether the judgment defendant or not, would be liable for the rents and profits during the year allowed for redemption. Such an interpretation of the statute does not accord with the holding in the other cases above cited. In the later case of *Ridgeway v. First Nat'l Bank*, *supra*, this case is not referred to in the principal opinion, but the other cases, holding that no one but the judgment debtor was liable for rents, were cited and approved. This really amounts to a disapproval of the interpretation of the statute in the Connelly case.

In the opinion upon the petition for a rehearing the case is briefly referred to, with the statement that it is not in conflict with the former cases. In the still later case of *Travelers Ins. Co. v. Brouse*, *supra*, involving the right of the court to appoint a receiver to collect the rents from the tenant of the judgment debtor, the case of *Connelly v. Dickson*, *supra*, is cited and quoted from with approval, including that portion of the opinion giving the interpretation of the statute. This, perhaps, can not be said to be a full approval of the interpretation of the statute, as no question of the personal liability of the tenant was involved. The case is again cited

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in the still later case of *Buchanan v. Berkshire Life Ins. Co.*, *supra*, in support of the proposition that a receiver may, in a proper case, be appointed to collect the rents from the tenant during the year allowed for redemption. Looking to all the cases upon the subject, the doctrine to be gathered from them, so far as is material here, seems to be that during the year allowed for redemption under the statute of 1861, the judgment debtor was entitled to the possession of the real estate, and the rents and profits therefrom; that he might occupy the same personally or by tenant; that he might sell the rents and profits, in which case his grantee could occupy the premises; that he might sell or assign the rents due from the tenant; that neither the tenant nor the owner of the rents and profits was personally liable to the execution purchaser; that in case the real estate was not redeemed, the judgment debtor was liable to the purchaser for the rents and profits; and that when the premises were occupied by a tenant, and the judgment debtor insolvent, a receiver might be appointed to collect the rents, and, in case the premises were not redeemed, pay them over to the execution purchaser.

So stood the law at the time the mortgage to Harris was executed by appellant and her husband. The statute, as thus interpreted, entered as a silent factor into, and became a part of, the contract between Harris and appellant's husband.

A subsequent law will not be allowed to materially alter or materially and seriously affect those rights, because to allow this would be to sanction a law which impairs the obligation of contracts, and this the Constitution forbids. *Ridgeway v. First Nat'l Bank*, *supra*; *Travellers Ins. Co. v. Brouse*, *supra*. In this latter case it was held that the redemption law of 1881 would not be allowed to take from mortgagee the right to recover the rents from the judgment debtor, he having failed to redeem. See, also, *Rorer Jud. Sales*, section 609, *et seq.*, and cases there cited; *Strong v. Clem*, 12 Ind. 37;

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Scobey v. Gibson, 17 Ind. 572; *Iglehart v. Wolfen*, 20 Ind. 32; *McGlothlin v. Pollard*, 81 Ind. 228; *Parkham v. Vandeventer*, 82 Ind. 544; *Helphenstine v. Meredith*, 84 Ind. 1; *Lease v. Owen Lodge, etc.*, 83 Ind. 498; *Cooley Const. Lim.*, 284, 290.

In the case of *Lewis v. Brackenridge*, 1 Blackf. 220, it was said: "The law, under which the contract was executed, is to be and remain the only rule by which the contract shall be construed. The obligation shall not be increased, nor the rights diminished, by any act of future legislation." And hence it is that the repeal of a statute, which has thus entered into and become a part of a contract, will not deprive the parties of their rights under the contract. Such a repeal is as much a violation of the Constitution as the passage of a new and different statute. *Hawthorne v. Calef*, 2 Wall. 10; *Hoffman v. City of Quincy*, 4 Wall. 535; *State, ex rel., v. Common Council of Madison*, 15 Wis. 30; *Smith v. City of Appleton*, 19 Wis. 468.

Upon the same principle it has been frequently held that the appraisement laws in force at the time the contract is made become a part of the contract, and that subsequent laws will not be allowed to materially and seriously alter or affect the rights of the parties. *Doe v. Heath*, 7 Blackf. 154; *Sheets v. Peabody*, 7 Blackf. 613; *Rawley v. Hooker*, 21 Ind. 144. And so it has been held that subsequent laws giving further stay of execution will not be allowed to affect parties who contracted under former laws. *Dormire v. Cogly*, 8 Blackf. 177, and cases there cited; *Strong v. Daniel*, 5 Ind. 348.

As to these laws, and the claim that they relate to the remedy, in which there are no vested rights, it is said in *Cooley's Constitutional Limitations*, pp. 285, 292, upon the authority of the decisions of this and the Supreme Courts of the United States, and the State of Michigan, that such a law, though professing to act only on the remedy, amounts to a denial or obstruction of the rights accruing by the contract, and is directly obnoxious to the prohibition of the Constitu-

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tion. And again, "In each of these cases it is evident that substantial rights were affected; and so far as the laws which were held void operated upon the remedy, they either had an effect equivalent to importing some new stipulation into the contract, or they failed to leave the party a substantial remedy such as was assured to him by the law in force when the contract was made." But, in order that a statute may be overthrown because in violation of a contract, it must materially affect the rights of the parties to the contract. It was said in the case of *Edwards v. Kearzey*, 96 U. S. 595: "It is to be understood that the encroachment thus denounced must be material. If it be not material, it will be regarded as of no account." See *Taylor v. Stockwell*, 66 Ind. 505; *Cooley Const. Lim.* 287.

It is well settled everywhere that there are no vested rights in the law generally, nor in legal remedies, and hence changes in these by the Legislature do not fall within the constitutional inhibition, unless they are of such a character as to materially affect the obligation of contracts. And hence laws which afford the means for a more efficient enforcement of a contract do not impair its obligations, and are valid. *Maynes v. Moore*, 16 Ind. 116; *Wood v. Kennedy*, 19 Ind. 68; *Webb v. Moore*, 25 Ind. 4; *Hopkins v. Jones*, 22 Ind. 310; *Andrews v. Russell*, 7 Blackf. 474; *Pierce v. Mills*, 21 Ind. 27; *Taylor v. Stockwell*, *supra*.

Tested by these rules, how stands the redemption law of 1879, with respect to contracts made before its enactment? Under the statute of 1861, the judgment debtor might redeem at any time within a year after the sale, and during that year, occupy the premises and enjoy the rents and profits. If he did not redeem within the year, he became liable to the purchaser for rents and profits.

Under like circumstances, he might redeem and enjoy the same privileges, and was alike liable, under the statute of 1879. So far the statute of 1879 was a re-enactment of the statute of 1861, and so far it may be said that the statute of 1861

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was not repealed by the statute of 1879. *Wood v. Kennedy, supra.*

Under the act of 1861, the judgment debtor might occupy the premises by a tenant, and so he might under the act of 1879. Here the differences between the statutes begin. The proviso to the act of 1879 was as follows: "*Provided, If such owner is not the actual occupant of the premises sold, but the same be occupied by a tenant or other person, such tenant or other person shall be liable to the purchaser for the reasonable rent or use, and occupation of the premises, and may be treated, in all respects, as the tenant of the purchaser, who shall, in case the property is redeemed, allow, as a payment upon his judgment, the amount of the rent by him collected.*"

Under the act of 1861, the tenant was primarily accountable to the judgment debtor, and not to the purchaser. If the judgment debtor was insolvent, a receiver might be appointed to collect the rents from the tenant, and hold them to be paid to the purchaser in case the premises were not redeemed.

Under the act of 1879, the tenant of the judgment debtor in possession was treated as the tenant of the purchaser, and was accountable to him for the reasonable rents in the first instance, whether the judgment debtor was solvent or insolvent.

If the premises were not redeemed, the rents thus collected belonged to the purchaser. If the premises were redeemed, the rents so collected were allowed as a payment in favor of the judgment debtor on the judgment. Under the act of 1861, if a person in good faith bought the rents from the judgment debtor, he could hold them as against the execution purchaser, and was not liable to him therefor. Under the act of 1879, if a person bought the rents from the judgment debtor, he paid him for them at his peril, because the occupant of the premises was liable to the execution purchaser for the reasonable rents. Did these changes so materially affect the rights of the mortgagor under his contract, made before the act of 1879 took effect, as to bring that act within the constitutional

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limitation? After mature deliberation we have reached the conclusion that they did not. Before the passage of the redemption laws, the execution purchaser was at once entitled to a deed and the possession of the premises.

While the statute of 1861 was, in a sense, benevolent in its object, in allowing the judgment debtor to occupy the premises for a year after the sale, and receive the rents and profits, it was evidently not its object that he should speculate with the possession, rents and profits, to the loss of the execution purchaser. Nor was it the main object of that statute, in the way of benevolence, to provide a home and a living for the judgment debtor during the year allowed for redemption. If that were so, then he should not have been made accountable in case the premises were not redeemed, nor could a receiver have been appointed, in any case, to collect the rents, to be paid to the purchaser upon a failure to redeem. Evidently, the main object of the statute was to enable the judgment debtor, by the use of the rents and profits, to redeem his property, and at the same time save the purchaser from loss, and hence the proviso, that if the premises were not redeemed, the judgment debtor should be accountable to the purchaser for the reasonable rents and profits; and hence, too, the rulings, that in certain cases a receiver would be appointed to collect the rents and hold them for the purchaser in case the premises were not redeemed.

Under the act of 1861, this object was accomplished by allowing the rents and profits to pass in the first instance to the judgment debtor, unless he occupied by a tenant, and was insolvent, and requiring him to account to the purchaser, in case the premises were not redeemed. Under the act of 1879, the same object was accomplished by requiring the judgment debtor, if he occupied the premises and did not redeem, to account to the purchaser for the reasonable rents, and by allowing the purchaser to collect the reasonable rents, in the first instance, from the other occupants of the premises, and keep them if the premises were not redeemed, and if they

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were redeemed, to allow a credit on the judgment for the amount collected. This additional authority on the part of the purchaser to collect the rents operated in the way of security.

The judgment debtor, occupying under the act of 1861, did so with the implied agreement on his part, that if he did not redeem he would pay to the purchaser the reasonable rents and profits. This agreement he might violate to the loss of the purchaser, by occupying the premises and refusing to pay. The act of 1879 prevented such bad faith and violation of contract on the part of the judgment debtor by passing the rents, in the first instance, to the purchaser, to be held and applied under the law, as the rights of the parties might be fixed by the redemption, or failure to redeem, by the judgment debtor. And thus the act of 1879 did not violate the contract between the parties, but secured its more sure and faithful performance. The main object of the act of 1861, and the contract under it, was accomplished by the act of 1879, but in a somewhat different mode. The act of 1879 may be, therefore, more properly styled a statute affecting and providing a more efficient remedy for the enforcement of the contract between the parties.

As we have seen, appellant's husband owed the debt, owned the land, and as the contracting party, appellant, his wife, joining, executed the mortgage to Harris. So far as concerns these contracting parties and the parties claiming under them, as Thomas F. McCreary and the parties to this suit, the contract should be enforced under the law of 1879. Had appellant occupied the land during the year allowed for redemption, she would have been liable for the reasonable rents to Thomas F. McCreary, the owner, through the sheriff's sale and deed. In the first place, she was a volunteer, not having paid her husband anything for the rents; and, in the second place, she became the assignee of the rents in 1880, when the law of 1879 was in force. She was bound to know that if she occupied the premises under the assignment, she would be compelled to account to the owner for the rents.

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At that time, her husband had no power to assign the rents during the year allowed for redemption, so as to defeat the right of the purchaser to collect the reasonable rent from the occupant. And so, when appellee became the tenant of appellant, he was bound to know that if the property should be sold under the mortgage, and he occupied it during the year allowed for redemption, he would be liable to the purchaser and owner for the reasonable rent. Had he refused to pay, the purchaser could have coerced payment.

One question remains: Appellee having been liable for the rent to the purchaser, and having paid to him, can he also be compelled to pay to appellant? The argument is made, that as he went into possession as appellant's tenant, he can not now dispute her title, and hence must pay to her. A sufficient answer to this is, that the act of 1879 made him the tenant of the purchaser and owner of the property, at least, so far as his accountability for rents was concerned, and to that extent, the act dissolved his relations with appellant.

As the court below ruled in accordance with this opinion, the judgment is affirmed.

Filed May 12, 1885; petition for a rehearing overruled Sept. 15, 1885.

No. 12,097.

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JURISDICTION.—*Judge in Vacation.*—A judge can exercise in vacation only such limited powers as may be specially granted by statute, and his jurisdiction must affirmatively appear of record.

SAME.—*Receiver.*—*Appointment of.*—If a judge in vacation may appoint a receiver where no process has issued and no appearance has been made to an action, but the person named as defendant in a complaint has voluntarily appeared to a motion made before the judge for the appointment of a receiver, still a judge has no power to make such an appointment, where, because of the want of the issue of process and the want of an appearance, no action is pending, and such defendant has not himself appeared, in person or by attorney, to such motion.

108	14
128	370
103	14
139	471
103	14
142	418
102	14
145	546
102	14
152	537

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SAME.—Appearance.—Plaintiff Can Not Appear for Defendant.—The filing and delivery to the judge by the plaintiff of papers purporting to be signed by the defendant can not constitute an appearance by the defendant to the action or to the plaintiff's motion for a receiver.

SAME.—Partners.—Mutual Request for Receiver.—A receiver can be appointed only in a proceeding where there are adverse parties. Partners can not, without any suit pending between them, obtain the appointment of a receiver of their property by their mutual request therefor, one putting his request in the form of a complaint against the other, and the latter his consent in the form of an answer to such complaint.

SAME.—Collateral Attack.—Where, from an inspection of the record, it affirmatively appears that no jurisdiction of the person was acquired, no presumption in favor of the judgment as against a collateral attack will be indulged.

From the Marion Superior Court.

F. Winter, R. B. Duncan, J. S. Duncan, C. W. Smith and J. R. Wilson, for appellant.

R. Hill, B. Harrison, W. H. H. Miller and J. B. Elam, for appellees.

MITCHELL, J.—From the complaint in this case the following facts appear: Alfred and John C. S. Harrison were partners doing business as bankers in the city of Indianapolis, and were the owners of real and personal property, some of which was partnership property, and some the individual property of the several partners. On the 18th day of July, 1884, Alfred Harrison filed, in the office of the clerk of the Marion Superior Court, a petition in which John C. S. Harrison was described as defendant. It was averred in the petition that the plaintiff and defendant were partners; that on account of insolvency they were unable to continue their partnership business. It was also averred that as a firm they were possessed of real and personal property, and that they were owing debts; that the partnership ought to be dissolved, and its affairs wound up. The prayer was, that a receiver should be appointed to take charge of the assets of the firm, etc.

With the petition Alfred Harrison also filed the following paper: "*Alfred Harrison v. John C. S. Harrison*. The defendant, John C. S. Harrison, admits the allegations of the

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complaint herein to be true. John C. S. Harrison." It is averred that no process was issued or served upon John C. S. Harrison, and that he did not appear to said petition either in person or by attorney.

Immediately upon the filing of the foregoing papers, Alfred Harrison presented them to the Honorable Lewis C. Walker, one of the judges of the Marion Superior Court, at chambers, in vacation, without any other proceedings having been taken thereon, and asked for the appointment of a receiver. Thereupon the judge made an order placing the assets of the firm in charge of the sheriff of Marion county, and held the matter of the appointment of a receiver under advisement.

It is further averred that on the 19th day of July, 1884, being still in vacation, Alfred Harrison filed, in the clerk's office, and presented to the judge at chambers, a supplemental petition, wherein he showed that both he and his partner were the owners of certain individual property, real and personal, which they were each willing to surrender for the benefit of their creditors, and praying that an order should be made turning their individual property over to a receiver to be appointed.

It is also alleged that no process was issued upon this supplemental complaint, and that John C. S. Harrison did not appear thereto, either in person or by attorney, but that at the time it was filed and presented Alfred Harrison filed and presented with the supplemental petition the following paper, purporting to be executed by John C. S. Harrison :

"THE STATE OF INDIANA, MARION COUNTY, ss :

"*Alfred Harrison v. John C. S. Harrison.* No. 32,604. Answer to supplemental complaint.

"John C. S. Harrison, defendant in the above entitled cause, says that he admits the allegations of the supplemental complaint of the plaintiff herein, and consents to the surrender of all of his individual property in the manner and for the purpose mentioned in said complaint.

"JOHN C. S. HARRISON, Defendant."

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Without any further proceedings Robert N. Lamb was thereupon appointed receiver. He qualified, took and continued in possession of all the partnership and individual property of the Harrisons.

At the time the proceedings above recited took place, the appellant, Pressley, was a creditor of the firm, and on the 25th day of August, 1884, recovered a judgment against its members for \$9,929.02 in the Marion Circuit Court. On this judgment execution was issued, which, at the commencement of this suit, on the 30th day of August, 1884, remained in the hands of the sheriff.

After reciting in detail facts of which the foregoing is the substance, the complaint charges that the appointment of the receiver in the manner stated was without the jurisdiction of the judge, and therefore void.

The relief prayed is that the lien of the appellant's judgment and execution should be declared to be prior to the claim and right of the receiver, and that he be directed to pay the claim of the appellant as a preferred lien.

A demurrer was sustained to the complaint, and the correctness of this ruling is the only question in the record. The case has been ably and elaborately argued on both sides.

On behalf of the appellant, it is contended that no receiver could be appointed until an action was pending, and that because no process was issued, and no appearance was entered for the defendant, before the receiver was appointed, no action was pending, and that, therefore, the appointment was void.

The contention of the appellees is, substantially, that a party against whom the appointment of a receiver is asked, may appear before the judge at any time and plead to the application, resist or consent to the appointment, and that, therefore, the papers filed by Alfred Harrison, who was the plaintiff in the petition, for John C. S. Harrison, the defendant, was such an appearance and answer as gave the judge jurisdiction to make the appointment.

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It is conceded that an action is not commenced until process has issued, or an appearance has been entered by the defendant. The power which a judge may exercise in vacation is such special statutory power as is prescribed. Whatever it is asserted may be done by him, except in term, authority therefor must be found in the statute. If not found there, it may be assumed that it does not exist. *Taylor v. Moffatt*, 2 Blackf. 305.

Under the code of 1852, in which it was provided that "a receiver may be appointed by the court" in certain cases, it was held that an appointment made by a judge in vacation was void. *Newman v. Hammond*, 46 Ind. 119.

The act of 1875, 2 R. S. 1876, p. 115, provided, substantially, as the chancery practice did, "That receivers shall not be appointed by any court, in any case, until the adverse party shall have appeared and answered in the action pending, or shall have had reasonable notice of the pendency of the action and the application for such appointment." *May v. Greenhill*, 80 Ind. 124.

By the code of 1881, section 1222, it is provided: "A receiver may be appointed by the court, or the judge thereof in vacation, in the following cases: * * * * *Second.* In actions between partners, or persons jointly interested in any property or fund."

It will be seen from the statute above quoted that a receiver may now be appointed by the court or judge in vacation, in *actions* between partners. As to the time when the appointment may be made the statute is silent. A receiver may be appointed "in actions," etc., is the provision of the statute. By the ancient practice of the court of chancery in England, a receiver was not appointed until after the coming in of the defendant's answer, but it is now settled, both in this country and in England, that the appointment may be made before answer, provided a special necessity therefor is shown to exist. High Receivers, secs. 105, 106.

Unless under extraordinary circumstances, as where the defendant had left the State to avoid process or the like, the

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rule seems to have been that a court could get no jurisdiction to appoint a receiver until after service of process and notice of the motion. *Whitehead v. Wooten*, 43 Miss. 523; *Edwards Receivers*, 13, 14. This was in effect the provision of the statute of 1875.

We think this rule prevails without substantial modification under existing statutes. We know of no decided case, except where the court was authorized by statute to preserve the estates of infants and lunatics, in which a receiver was appointed before a suit was pending.

If an immediate necessity therefor is shown to exist, the application for a receiver may be entertained when the action is commenced, which, under the rule here, is when process is issued, or an appearance to the action is entered, in the manner recognized, but as the appointment of a receiver in any case is a provisional remedy, auxiliary to the action or the relief prayed for therein, neither the court in term nor judge in vacation can acquire jurisdiction to appoint a receiver until there is an action pending. The application for a receiver is an interlocutory proceeding in a pending suit. *Brinkman v. Ritzinger*, 82 Ind. 358; *Dale v. Kent*, 58 Ind. 584; *Merchants', etc., Bank v. Kent*, 43 Mich. 292. Unless it is shown that on account of absence, or for some other cause, process can not be served on the defendant, the application should not be entertained until after service and notice.

The action pending is the principal thing; the application for, and appointment of, a receiver is a mere incident, to preserve the subject of litigation until the decree is given, and made effectual; and as necessary to the incident, the action must be pending. Such applications are properly made on written motion or petition, with notice to the defendant. Affidavits, or, in the discretion of the court or judge, oral testimony, may be heard in support of or against the motion, but no pleadings are contemplated so far as respects the motion or application. This was ruled in *Pouder v. Tate*, 96 Ind. 330, where it was held that an offer to file a demurrer

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to an application for a receiver was properly refused. So, in *Buchanan v. Berkshire Life Ins. Co.*, 96 Ind. 510, it was held that to an application for the appointment of a receiver no answer or other formal pleadings were authorized.

As it is a prerequisite to the power of a judge to act upon the application for a receiver, that there should be a case pending in which the receiver is to be appointed, and as in the motion for the appointment nothing is before the judge for determination except the application, and as to such application no pleadings are proper, it may well be doubted whether in any case jurisdiction to make such appointment could be acquired by a judge at chambers by the voluntary appearance of the defendant to such motion where no process had issued, and no appearance was entered in the case.

The obstacle which stands in the way of upholding the appointment which is assailed here, however, is found in the fact that no action was pending at the time, and in the further fact that John C. S. Harrison did not appear before the judge either in person or by attorney.

It is impossible to hold that signing and delivering to the plaintiff in the case the several papers above set out, and the presentation of them by him to the judge, constituted an appearance by the defendant, either to the action or to the proceeding before the judge.

An unbroken line of decisions of this court has settled the rule that in order to confer jurisdiction over the person of a defendant in a judicial proceeding, where process has not been issued and served, his presence in court, either in person or by attorney, is indispensable. *McCormack v. First Nat'l Bank*, 53 Ind. 466; *Rhoades v. Delaney*, 50 Ind. 468; *Craig v. Glass*, 1 Ind. 88; *Ferrand v. McCleese*, 1 Ind. 87; *Harris v. Stanton*, 4 Ind. 120; *Comparet v. Hanna*, 34 Ind. 74; *Scott v. H.*, 14 Ind. 136; *Willman v. Willman*, 57 Ind. 500; *Paulus v. Latta*, 93 Ind. 34.

In *Robinson v. Board, etc.*, 37 Ind. 333, it was said: "Assuming that the proceeding was of an adversary character,

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then, to make Robinson a party, he must have been brought in in some mode prescribed by law, or he must have voluntarily appeared to the proceeding. The record does not show that he became a party in either of these modes; or, in other words, that he was a party at all." See, also, *Gilmore v. Board, etc.*, 35 Ind. 344.

Even if it were conceded that a receiver might in any case be appointed before the action was pending, where the defendant appeared before the court or judge, it must nevertheless be held that the appearance of the defendant must have been in a manner which is recognized by the law as an appearance. It can not be maintained that such an appearance was entered in this case.

Actions in which receivers may be appointed must be actions in which there are adversary parties. A receiver can not be appointed in an *ex parte* proceeding. *Hardy v. McClellan*, 53 Miss. 507. This being so, it must result from the very nature of things, that one adversary litigant, without express statutory authority, could not appear for and give jurisdiction to the court or judge over the other.

It is of the essence of judicial proceedings which can not be *ex parte*, that they should be *inter partes*, and as a proceeding in which a receiver may be appointed can not be an *ex parte* proceeding, it results that there must be upon the record and before the court or judge adverse parties. One party to an adversary proceeding can not do anything, nor can he be authorized to do anything by the other, which can give the court or judge jurisdiction over him except as the statute has enacted.

As the statute does not authorize, and public policy forbids, one party to appear for the other, it must be held that where it appears, as here, that the only jurisdiction which the court or judge had over the defendant was such as was acquired through the agency of the plaintiff in appearing for him, its proceeding was without jurisdiction and void.

It is said by counsel for the appellees that the papers signed

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by John C. S. Harrison, and presented by Alfred Harrison, were in effect requests to the judge to appoint a receiver. It is in that character we regard them, and it is that fact which makes the whole proceeding in legal effect *ex parte*. It was nothing more than the two partners uniting in a request to the judge in vacation for the appointment of a receiver without a suit pending. That the one put his request in one paper and the other his consent in another, entitling each with a caption as if they were adverse parties, counts for nothing. The substance of the proceeding was as stated above.

We have no doubt that parties to a controversy in an action pending may consent to the appointment of a receiver. We know of no authority, however, for partners to go before a court in term, or a judge in vacation, without a suit pending, and by mutual consent effect a voluntary assignment in the manner here proposed.

The statute enacted for that purpose points out the appropriate means to that end, and it declares further that all other assignments shall be deemed fraudulent and void.

The argument is made that as this is a collateral attack upon a judgment, the jurisdiction of the court or judge will be conclusively presumed. This contention can not prevail. The complaint in this case avers, and the demurrer admits, that at the time the receiver was appointed no action was pending, that no process had been either issued or served on John C. S. Harrison, and that he did not appear to the action or motion, either in person or by attorney.

From this admission it results that the judge acquired no jurisdiction over the subject-matter of the receivership or of the person of the defendant, and the appointment was, consequently, not merely irregular, but absolutely void.

When the record of a court of general jurisdiction is silent upon the subject of the service of process, the presumption will be indulged that jurisdiction of the person was acquired as against a collateral attack. Parties to the record in such cases, and those in privity with them, will not be heard to

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impeach it collaterally; but where from an inspection of the record it affirmatively appears that no jurisdiction was acquired, such presumption will not be indulged, and the fact may be shown collaterally. *Coan v. Clow*, 83 Ind. 417; *Cavanaugh v. Smith*, 84 Ind. 380; *Woodhull v. Freeman*, 21 Ind. 229; *State, ex rel., v. Hudson*, 37 Ind. 198; *Warring v. Hill*, 89 Ind. 497.

As we have already observed, a judge in vacation exercises only limited statutory power, and in such cases it must affirmatively appear that such a state of facts existed as warranted the exercise of jurisdiction. *Cobb v. State*, 27 Ind. 133; *Britton v. State, ex rel.*, 54 Ind. 535; *Newman v. Manning*, 89 Ind. 422; *Nicholson v. Stephens*, 47 Ind. 185.

The appellant here is a stranger to the proceeding assailed, and as such it is competent for him to allege and show the want of jurisdiction, and consequent invalidity of the proceeding.

The judgment is reversed, with costs, with directions to the court below to overrule the demurrer to the complaint.

ELLIOTT, J., did not participate in the decision of this cause.

Filed May 16, 1885.

No. 11,728.

LANTZ v. MAFFETT ET AL.

DECEDENTS' ESTATES.—*Sale of Real Estate.—Conclusiveness of Order of Sale.*—

Where the petition of the administrator of a decedent avers that the land sought to be sold was owned in fee by the decedent, and the heirs are made parties to the proceeding, the order of the court concludes them from setting up title to the real estate ordered to be sold.

SAME.—*Judgment.—Estoppel.—Cases Distinguished.*—Where the petition of an administrator of a deceased woman avers that she died the owner in fee of the real estate, and the heirs are made parties thereto, the judgment in favor of the administrator estops the heirs from setting up that the only interest the woman ever had in the land was a life-estate. Such a judgment can not be collaterally attacked. *Elliott v. Frakes*, 71 Ind. 416, and *Armstrong v. Curitt*, 78 Ind. 482, distinguished.

102	23
126	180
126	406
126	510
102	23
130	520
102	23
131	90
131	104
131	588
102	23
134	429
136	579
102	23
138	372
139	294
102	23
140	441
141	579
102	23
149	394
150	603
151	195
102	23
153	664
102	23
155	398
155	399
156	614
156	617

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JURISDICTION.—*Judgment.*—*Collateral Attack.*—Authority to hear and decide a legal controversy is jurisdiction, and where there is such authority the judgment can not be collaterally attacked although it may be erroneous.

SAME.—*When Judgment Can Not be Collaterally Impeached.*—Where it appears on the face of the record that the court had jurisdiction, the judgment can not be impeached collaterally.

SAME.—*Decedents' Estates.*—*Court of Common Pleas.*—The court of common pleas had jurisdiction to try and determine the question of title to land sought to be sold by an administrator to pay debts due from the estate of his intestate.

From the Hancock Circuit Court.

W. H. Martin, for appellant.

J. H. Mellett, W. S. Denton, I. P. Poulson and W. F. McBane, for appellees.

ELLIOTT, J.—The material facts stated in the special finding, exhibited in a somewhat abridged form, are these: On the 25th day of November, 1875, John W. Maffett died intestate, the owner of the land described in the pleadings. He left surviving him his widow, Caroline Maffett, and his children, John W. and Sarah L. Maffett. Subsequently the widow married Charles Niles, and died during coverture seized of one-third of the land described. The interest of which she died seized vested in her by virtue of her rights as the widow of John W. Maffett, her first husband. Daniel Morford became the administrator of her estate, and petitioned for an order to sell her land to pay debts due from her estate; to this petition the children of the intestate and John W. Maffett, her first husband, were made parties, and they answered by a guardian *ad litem*. It was alleged in the petition that the intestate, Caroline Niles, was the owner in fee of the one-third part of the land. The proceedings were in due form, and sale was made pursuant to the order of the court, and the land was bought and paid for by the appellant.

The contention of the appellant is, that, as it appeared on the face of the petition that the intestate owned the land in fee simple, and as the manner in which she acquired her title

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did not appear, the judgment is valid on its face and can not be overthrown by a collateral attack. In support of this position, counsel invoke the rule that unless the record on its face shows that the judgment is void, it can not be assailed collaterally. The appellees oppose to this position the argument that the court had no jurisdiction to order the sale of the land, and that they are not estopped by the judgment, for the reason that they were required to defend only in the capacity of heirs.

The appellees rely on the cases of *Armstrong v. Cavitt*, 78 Ind. 467, and *Elliott v. Frakes*, 71 Ind. 412. These cases are representatives of two different classes, and it is necessary to examine them separately and ascertain their bearing upon the present controversy.

Armstrong v. Cavitt, *supra*, has been followed in several subsequent cases, and must be regarded as correctly expressing the law. *Slack v. Thacker*, 84 Ind. 418; *Hendrix v. McBeth*, 87 Ind. 287; *Compton v. Pruitt*, 88 Ind. 171; *Flenner v. Benson*, 89 Ind. 108; *Flenner v. Travellers Ins. Co.*, 89 Ind. 164; *Nutter v. Hawkins*, 93 Ind. 260; *Matthews v. Pate*, 93 Ind. 443; *Pepper v. Zahnsinger*, 94 Ind. 88. If the principle declared in these cases rules here, the discussion is at an end. The debatable question, however, is not what principle those cases declare, but whether the case in hand falls within it. The principle declared by these cases is, that the widow's interest in the real estate vested in her by virtue of her marital rights can not be sold to pay the husband's debts, and that it is beyond the power of the jurisdiction of the court to order it sold. That principle can not apply here, for the reason that it was the wife's estate that was ordered sold, and the order was made to sell it for the payment of her own debts, and not for the payment of the debts of the husband. The petition in this case proceeded upon the theory that the wife owned the land, and that her estate was the debtor; while in the cases cited the petition proceeded upon the theory that the land belonged to the husband and was liable to sale for the

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payment of his debts. The issue tendered by the petition in this case was that the wife's estate was the debtor and she the owner of the land at the time of her death. In the cases cited the issue tendered was, that the husband owned the land and his estate was the debtor. In the cases referred to the controlling questions as they appeared upon the face of the record were, did the husband own the land, and was it liable for his debts? While here the questions disclosed by the record were, did the wife die the owner in fee of the land, and was it liable for her debts? In the cases cited the rights of the wife appeared upon the face of the record, and a purchaser was bound to know that he could not secure her estate in the land upon a sale made under an order directing its sale for the payment of her husband's debts; while in the case under discussion the face of the record showed the wife to be the owner in fee, and that it was her estate that owed the debts for which the land was ordered sold. In the one case the material inquiry is as to the rights of the widow against the creditors of the husband. In the other the important inquiry is as to the rights of the creditors of the deceased woman in land of which she died the owner in fee, as against her surviving children. This is necessarily so, for the petition avers that she died the owner in fee of the land, and that she died in debt. The controlling issue which the petition challenged the surviving children to meet was whether she was in fact the owner in fee of the land, and did in fact die leaving creditors. We have ascertained that the principle deducible from *Armstrong v. Cavitt, supra*, and cases of that class, does not rule such a case as this, and we now proceed to ascertain whether the principle declared in the other class of cases governs here.

Elliott v. Frakes, supra, decides, as does *Armstrong v. Cavitt, supra*, that the widow's interest can not be sold to pay the husband's debts, and decides, also, that children made parties to a petition to sell lands of their deceased father are not estopped from claiming the estate which descends to them from their mother. The court, in the course of the opinion, said,

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in speaking of the appearance of the children, that "They were not required to appear or answer as the devisees of Elizabeth Sipe, and hence no issue was tendered to them as to their interests as such devisees. It follows, that, in their character as such devisees, they were not concluded by the order of sale." It is obvious that the decision in the case cited proceeds upon the theory that persons sued in one capacity can not be estopped as to rights vested in them in another. The court referred to a page in a text-book, where it is said: "As a general rule, judgments conclude the parties only in the character in which they sue or are sued." Bigelow Estop., p. 65. In order to make this principle applicable here, it must be assumed that the appellees were not made parties in the character of heirs of their deceased mother, and this assumption can not be justly made. They were made parties in that character. The petition alleged that the land belonged to their mother in fee, and that they were interested in it as her heirs. They were, therefore, sued, not in the character of the heirs of their deceased father, but in their character as heirs of their deceased mother. Their rights as her heirs were put in issue, and when they appeared to try that issue, they appeared in the character of her heirs. It was not possible for them to assume any other character under the answer filed for them by their guardian *ad litem*. The issue joined affected them as the heirs of the mother, and not in any other character. The issue tried and determined was as to their interest in the land as the heirs of their deceased mother, and it was the interest which that character gave them that the petition sought to divest. It is quite clear, therefore, that the principle declared in *Elliott v. Frakes, supra*, is not the one which governs this case, and we must look for some other principle to guide us to a correct solution of the legal problem presented.

If, as the petition alleged, the fee of the land was in the mother, then the court had jurisdiction to direct the administrator to sell it to pay her debts. If the court had jurisdiction, its judgment, however erroneous, is not void, and if

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not void it is not vulnerable to a collateral attack. The only possible theory upon which the appellees can succeed is, that the court had no jurisdiction to make the order, for once it is granted that it did possess jurisdiction, then its judgment is of such verity and force as to be impeachable only by a direct attack.

Jurisdiction is the authority to hear and decide a legal controversy. It was said by the Supreme Court of the United States, that "If the law confers the power to render a judgment or decree, then the court has jurisdiction. What shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action by hearing and determining it." *Rhode Island v. Massachusetts*, 12 Pet. 657.

"Any movement of a court is," as it was said in *Board, etc., v. Markle*, 46 Ind. 96, "necessarily jurisdiction." It does not affect the question of jurisdiction that the judgment rendered was plainly erroneous, for, as it has been said, "the power to decide at all, necessarily carries with it the power to decide wrong as well as right." *Snelson v. State*, 16 Ind. 29. There are very many cases enforcing these general principles, among them *DeQuindre v. Williams*, 31 Ind. 444, *Weston v. Lumley*, 33 Ind. 486, *Dowell v. Lahr*, 97 Ind. 146, *Oppenheim v. Pittsburgh, etc., R. W. Co.*, 85 Ind. 471, *Davidson v. Koehler*, 76 Ind. 398, *vide* auth. p. 421.

It seems clear that the face of the record discloses a case in which the court had jurisdiction of the subject-matter and of the persons of the parties, and, as this plenary jurisdiction existed, the judgment will repel all collateral attacks.

The case, when trimmed down to its real merits, comes to this, the petition of the administrator averred that his intestate owned the fee; the appellees answered this petition; the court tried the issue, and erred in finding that, as matter of fact, the intestate did own the land. There was jurisdiction, but a wrong decision. As there was jurisdiction, nothing but a direct attack upon the judgment can shake it.

It has often been held that a judgment rendered by a court

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having general jurisdiction will be upheld against a collateral attack, unless it appears on the face of the record to be void. *Earle v. Earle*, 91 Ind. 27, see p. 42; *Smith v. Hess*, 91 Ind. 424. A text-writer, in discussing this general subject, says: "But the word void can with no propriety be applied to a thing which appears to be sound, and which, while in existence, can command and enforce respect, and whose infirmity can not be made manifest." Freeman Judg., sec. 116. This principle fully applies here. Under the law in force when the proceedings were had for the sale of the land, the court of common pleas possessed ample jurisdiction over the general subject of the settlement of decedents' estates, and had authority to order the sale of a decedent's land to pay debts; the petition averred such facts as brought the particular case within the jurisdiction of the court, and due notice was given of the filing of the petition, so that the order was made upon due notice and in the exercise of a general jurisdiction properly invoked by petition. The record is, therefore, not only "sound," but is also regular on its face. In order to make any irregularity or unsoundness appear, it is necessary for the appellees to show that a material fact stated in the petition, and found to be true by the court, was untrue, and this would make it necessary to present anew an issue of fact once regularly presented and tried, and this, it is evident, can not be done.

It has been decided quite a number of times that the court of common pleas had jurisdiction to try the question of title in cases where land was sought to be sold to pay debts. In *Gavin v. Graydon*, 41 Ind. 559, the controversy was, in its legal aspects, much the same as here, and it was held that the judgment of the court of common pleas ordering the sale for the payment of debts concluded the heir as to all questions concerning the title to the land. In the course of the opinion it was said: "Exclusive jurisdiction is conferred upon the court to order the sale of real estate, and it seems to us that the power to make the order carries with it the right to de-

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termine the title." *Wolcott v. Wigton*, 7 Ind. 44; *Holliday v. Spencer*, 7 Ind. 632; *Fleming v. Potter*, 14 Ind. 486; *Bourgette v. Hubinger*, 30 Ind. 296; *Simpson v. Pearson*, 31 Ind. 1.

Whatever may be the rights of the appellees in a direct proceeding, it is manifest that they can not prevail against the judgment directing the sale of the land, in this collateral proceeding. Judgment reversed.

Filed March 11, 1885.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—The assumption upon which counsel's argument on the petition for a rehearing rests is one that can not be maintained. It is not true, as assumed, that the issue tendered by the petition of an administrator to sell lands for the payment of debts owing by the decedent's estate involves no question of title. If this assumption were correct, then there would be no reason for the petition to aver ownership in the decedent, or for making the heirs parties to answer as to their interests in the land. It is said by counsel: "The heir is challenged to meet the allegation of indebtedness. If he can defeat that allegation he will successfully defend his title; if not, the title of the deceased, and his title, as heir of the deceased debtor, will be of no consequence to him whatever." The fallacy of this argument is apparent; it unduly assumes that the heir is only challenged to meet the allegation of indebtedness; whereas he is challenged to meet that claim and also meet the claim that the land was owned by the deceased, and is subject to sale for the payment of his debts. One of the most important issues which the heir, or other party, is challenged to meet is the right of the administrator to sell the land. That such an issue should be met and settled is demanded by high considerations; it is demanded by the interests of society, which require the firm and speedy settlement of controversies; it is demanded for the security of purchasers at administrators' sales; it is demanded for the benefit of heirs and creditors who have an interest in securing

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confidence in judicial sales, and it is demanded in order to give stability to titles and inspire confidence in the judgments of the courts.

The petition in the case before us averred, in direct and explicit terms, that the decedent was the owner in fee of the real estate, and challenged the appellees to meet and contest that question. It was made an issue, and it was an issue that it was indispensably necessary should be tried. If, as the appellees now claim, they owned the land, then the administrator had no authority to sell it; but that was the controlling question in the proceedings instituted by the administrator, and is one of the questions settled by the judgment there pronounced. The administrator was bound to aver that his intestate owned the land—he could not of course sell a third person's land—but when he made this averment in due form, and brought the adverse claimants into court by due process of law to meet that issue, and obtained a judgment deciding the issue in his favor, the question was settled.

There is no question here as to the effect of an order of sale upon after-acquired rights, for such rights as the appellees have existed, if at all, at the time they were brought into court to answer the claim of the administrator that the land was owned in fee simple by his intestate. If they owned the land, and the intestate did not, they should have averred that fact and have contested the question when offered the opportunity to do so.

It is also said by counsel: "If in this case the land was subject to the debts of the deceased, the appellees are concluded by the proceedings; if it was not, they are not concluded." This statement exposes the unsoundness of counsel's former position, for the question whether the land was subject to the decedent's debts depends upon whether she owned it; if the defendants to the petition owned it, of course it was not subject to her debts, and this was the issue presented by the petition. If presented the appellees were bound to meet it, and, if decided against them, they could not after-

wards assert a title existing when they were brought into court.

The appellees were brought into court in the capacity of heirs of the decedent, and it was the land as her land that the administrator sought an order to sell. If they were not her heirs as to the land described, they should have litigated that question, and can not now assert that they were not her heirs, but had then and still have an interest of a different character in the land. If they were her heirs, and if she did own the land, it was subject to sale for the payment of her debts, and this is what the judgment conclusively adjudicates. If the heirs are in court, and if the issue is made as to their heirship, it is necessarily decided by the order directing the sale of the land, and that issue was made here, for it was alleged that Mrs. Niles owned the land, and that appellees were her heirs. The success of the appellees in this case depends entirely upon their overthrowing the judgment of the court that the decedent owned the land, for, in order to succeed, they must make it appear that some other person did, in fact, own it, and this would require the complete and total overthrow of the judgment. This result would lead to a violation of long settled principles.

The conclusion reached in this case is not, as was shown in the original opinion, in conflict with the doctrine that a party is estopped only in the capacity in which he is sued, and is, therefore, not in conflict with the ruling in *Lord v. Wilcox*, 99 Ind. 491. A person made party as heir can not be concluded in his capacity of lien-holder, but may be concluded from collaterally questioning any matter directly affecting him in the capacity in which he is sued, and in such a case as the present this involves the question whether the decedent was or was not the owner of the land. *Gavin v. Graydon*, 41 Ind. 559.

Petition overruled.

Filed May 23, 1885.

Rogers v. Beauchamp et al.

No. 11,062.

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102	33
138	372
102	38
154	156
154	290

JUDGE PRO TEMPORE.—*Appointment of.*—*Record.*—*Collateral Attack.*—Where the record on appeal shows the appointment of a judge *pro tempore* of the circuit court to have been regularly made, that he qualified, caused his appointment and oath to be properly entered on the order-book, and presided under such appointment during a term of such court, a party against whom judgment has been rendered during such term will not be heard, in a subsequent proceeding to set aside such judgment, to impeach and contradict the record by the allegation of facts and circumstances *dehors* the record, tending to show that the appointment had not been so made; and a complaint to enjoin the collection of such judgment, which admits that according to the record the appointment was properly made, but avers facts contradictory of the record and denying the appointment, is bad on demurrer.

SUPERIOR COURT OF VIGO COUNTY.—*Jurisdiction.*—Query, whether the superior court of Vigo county has jurisdiction over the judgments and process of the circuit court of that county. ●

From the Vigo Superior Court.

S. C. Stimson, R. B. Stimson and R. Dunnigan, for appellant.

J. W. Shelton, for appellees.

Howk, J.—The only error assigned by the appellant, the plaintiff below, upon the record of this cause, is the sustaining of the defendants' demurrer, for the want of sufficient facts, to his complaint.

Appellant Rogers alleged in his complaint that during the year 1881 Hon. Harvey D. Scott was the regular judge of the Vigo Circuit Court, of Vigo county, in this State; that during the vacation of such court preceding its September term, 1881, Judge Scott was sick in Battle Creek, in the State of Michigan, and was thereby unable to return to this State or to hold the September term, 1881, of such court; that, in order that the court should not lapse, by reason of his sickness and absence, Judge Scott wrote to I. N. Pierce, Esq., an attorney of such court, informing him of such sickness, and

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requesting him to ascertain the wishes of the bar of such court as to the appointment of a judge *pro tempore* to hold such September term of the court, and to make a selection and prepare an appointment and send it to him for his signature, and suggesting that Charles Cruft, Esq., a regular practicing attorney of such court and eligible to the office of judge, would be a desirable appointment, but intimating that he would conform to the selection made by the bar; that thereupon I. N. Pierce prepared and sent to Judge Scott an appointment in blank of a judge *pro tempore* to hold the September term, 1881, of such court; that when such appointment was received by Judge Scott he was very sick, and signed the same without observing or filling the blank left therein for the name of the appointee; that in this condition the appointment was returned to Pierce by mail, and was so delivered to said Charles Cruft, there not being sufficient time to return the same to Judge Scott for amendment before such term of court should begin; that Cruft, having been informed that Judge Scott had so suggested his name as aforesaid, caused his own name to be inserted in such blank appointment as the appointee, and on the 5th day of September, 1881, caused such appointment, with his name so filled therein, to be entered upon the order-book of such court, and, having been duly sworn, proceeded to discharge the duties of judge of such court for such term; and that Judge Scott was absent from such court during such entire term, and signed none of the records or entries of such term in the order-book of the court, but that all such entries and records were signed by said Cruft as judge.

And the appellant further alleged that at the September term, 1881, of such court, there was an action pending wherein the appellee Beauchamp was plaintiff and the appellant Rogers was defendant; that the appellant and his attorneys in such action, being ignorant of the manner of Cruft's appointment as judge of such court, or of any of the circumstances above stated, except so far as they may be constructively charged

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with knowledge thereof by the record in such action, submitted the cause for trial to Cruft as judge of the court for such term, who ordered final judgment therein against the appellant; that the appellant and his attorneys did know that Charles Cruft was acting as judge of such court for its September term, 1881; and that the sole authority of Cruft to act as such judge was his appointment made and procured as aforesaid. Wherefore appellant said that such judgment was void.

Appellant further alleged that appellee Beauchamp had caused an execution to be issued on such void judgment, which writ was then in the hands of appellee, John Cleary, as sheriff of Vigo county; and that Cleary, as such sheriff, was about to levy such execution on the property of the appellant, to his irreparable injury. Wherefore, etc.

The appellees' counsel has not favored this court with any brief or argument in support of the decision below sustaining their demurrer to the foregoing complaint; but counsel has left us to find out, if we can, the grounds, if any, upon which such decision can be sustained. We may remark in the outset, that we can perceive no sufficient reason, and none is stated, for the commencement of this suit in the superior court of Vigo county. The objects of the suit, as shown by the complaint, were to have a judgment of the Vigo Circuit Court, a court of at least equal, if not superior, dignity to such superior court, annulled and declared void, and the collection of an execution issued on such judgment enjoined, by the decree of the superior court. It is true that the jurisdiction of the superior court of the subject-matter of this suit was not called in question below, nor is it questioned here in any manner, by any assignment of error or cross error, or otherwise. But the question is in the record, and while we are not required to decide it as the case is presented, yet we do not wish it to appear that the question escaped our notice. While we do not decide the question, it is not improper for us to say that the jurisdiction of the superior court of Vigo

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county, over the judgments and process of the Vigo Circuit Court, for the purposes sought in this suit, may well be questioned, and is, at least, doubtful.

Waiving this point, however, we are of opinion that the appellant's complaint, if his suit had been instituted in the proper court, does not state facts sufficient to constitute a cause of action, or to entitle him to the relief demanded therein. It will be observed that in his complaint the appellant seeks to have the judgment against him, therein described, annulled and declared void by the allegation of facts and circumstances not apparent on the face of the judgment, but wholly *dehors* the record. Such a complaint makes a collateral attack on the judgment described therein, and is bad on demurrer for the want of sufficient facts. This is settled by many decisions of this court. *Pressler v. Turner*, 57 Ind. 56; *Reed v. Whitton*, 78 Ind. 579; *Oppenheim v. Pittsburgh, etc., R. W. Co.*, 85 Ind. 471; *State, ex rel., v. Murdock*, 86 Ind. 124; *Smith v. Hess*, 91 Ind. 424; *Reid v. Mitchell*, 93 Ind. 469; *Young v. Wells*, 97 Ind. 410; *Dowell v. Lahr*, 97 Ind. 146.

In the case in hand the appellant seeks to have the judgment against him annulled and declared void upon the ground that the Vigo Circuit Court lapsed for the want of a judge, and was not in session during its September term, 1881, when such judgment was rendered. Of course there can not be a court without a judge. But it is not claimed that the record shows there was no judge present during the term. On the contrary, it is stated in the complaint that the record does show that Harvey D. Scott, judge of the Vigo Circuit Court, "being unable by reason of sickness to preside at the September term, 1881, of such court," did appoint in writing "Charles Cruft, an attorney of such court, to preside and hold the said term of such court;" that Cruft accepted such appointment, and took and subscribed the oath required by law; that on the first day of such September term Cruft caused his written appointment and oath to be entered on the order-book of such

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court; and that Cruft presided and held such September term, 1881, of such court, without objection from the appellant or from any one else. In his complaint the appellant seeks to impeach and contradict this record by the allegation of facts and circumstances *dehors* the record, tending to show that Judge Scott had never in fact appointed Cruft, as judge *pro tempore*, to hold such term of such court. This was a collateral attack upon the record, and therefore the appellees' demurrer to the complaint was correctly sustained. *Reid v. Mitchell, supra*.

Judge Scott's appointment of Charles Cruft, as judge *pro tempore* was fully authorized by the provisions of section 4 of the act of March 1st, 1855, providing for the holding of terms, etc., of courts "when the judge is absent or unable to attend" (Acts 1855, p. 61; 2 R. S. 1876, p. 10), which section of the statute we have held and yet hold to be in full force. *Zonker v. Cowan*, 84 Ind. 395; *State, ex rel., v. Murdock, supra*. As entered upon the order-book Cruft's appointment was in all respects regular. In *Case v. State*, 5 Ind. 1, the court said: "The appointment constitutes a part of the record. It appears in legal form, and gave to the appointee at least a colorable title to the office. He was no usurper, but supposed himself to be rightfully invested, and acted in good faith. A court *de facto*, it not *de jure*, was thus constituted." In *Feaster v. Woodfill*, 23 Ind. 493, it was held that "when the appointment is regular on its face, the objection must be made at the trial, or all objections to the authority of such appointee will be deemed waived." In *State, ex rel., v. Murdock, supra*, it is said: "If such appointee holds under color of right he is, while so holding, a judge *de facto*, and the validity of his acts can not be questioned by a party, for the first time, in a collateral attack." Our conclusion is that the demurrer to the complaint was correctly sustained.

The judgment is affirmed with costs.

Filed May 16, 1885.

Mason v. Mason.

No. 12,076.

MASON v. MASON.

PLEADING.—Contract.—Naked Averment of Mistake.—A naked averment of mistake, without seeking a reformation of the contract, can not avoid the defence created by the agreement.

SAME.—Reformation Should be Asked in Complaint.—*Semble*, that where the correction of a mistake in a written agreement is necessary to enable the plaintiff to recover, reformation should be asked in the complaint, and not by reply.

PRACTICE.—Pleading.—Harmless Error.—It is not an available error to sustain a demurrer to a paragraph of answer setting up facts specially which are admissible under the general denial, also pleaded.

SAME.—Where two paragraphs of reply, substantially alike, are directed to the same paragraph of answer, it is not an available error to sustain a demurrer to one, even if good.

SAME.—Appeal.—Where, on appeal, it appears from the record that the appellant, the plaintiff below, was not entitled to recover anything, rulings of the trial court, though erroneous, will be considered harmless and not available for the reversal of the judgment.

From the Brown Circuit Court.

C. M. Duncan, A. Percifield, W. R. Harrison and W. E. McCord. for appellant.

J. V. Mitchell and J. F. Cox, for appellee.

BEST, C.—The appellant brought this action against the appellee upon an account for money loaned, money had and received, property sold and delivered, and for rents due and unpaid, aggregating \$6,000.

The appellee filed an answer of four paragraphs. The first was the general denial. The second was a set-off for goods furnished, labor performed, money expended and repairs made at the appellant's request, aggregating \$7,000. The third and fourth alleged a prior settlement of all matters of difference as per written agreement, a copy of which was filed, and by which the appellee obligated himself, in consideration of such settlement, to pay a school mortgage and to pay the appellant upon demand \$450. It was further alleged that the school mortgage had been paid; that the appellee had paid

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the appellant \$250, and the residue, with interest thereon, was brought into court in discharge of such obligation.

The appellant filed a reply of six paragraphs. The first was the general denial, and the others were special. A demurrer was sustained to the second, fourth and fifth, and an exception reserved. Trial, verdict and judgment for the appellee. Motion for a new trial overruled. This ruling and the ruling upon the demurrer are assigned as error.

The second paragraph of the reply was limited to that portion of the second paragraph of the answer which charged the appellant with certain sums of money paid to, and expended for, her benefit, and alleged that such sums of money belonged to the appellant. These facts were admissible in evidence under the general denial. If the money belonged to the appellant, she did not become indebted to the appellee by reason of its reception either directly or indirectly, and evidence tending to establish such fact went in denial of the appellee's claim. It was therefore admissible under the general denial, and as that answer remained on file no available error was committed in sustaining the demurrer to this paragraph. *Wilson v. Root*, 43 Ind. 486; *Fuller v. Wright*, 59 Ind. 333.

The third, fourth and fifth paragraphs of the reply were directed to the third paragraph of the answer, and each of them avers, in substance, that the matters and things mentioned in the complaint were not embraced in such settlement, but that only the sum received by the appellee from a sale of the appellant's land was then settled and adjusted. The third and fifth are substantially alike, each alleging that such settlement was fraudulently procured; and as the third remained on file it follows that no available error was committed in sustaining the demurrer to the fifth, whether it was good or bad.

The fourth alleged that the appellee represented that he had only received \$500 from a sale of such land, and that such item was alone settled at the time such agreement was made, and that the scrivener, in preparing such agreement of

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settlement, had, by mistake, inserted the stipulation that such agreement was in full settlement of all matters of difference between them. The stipulation is in these words: "An agreement made and entered into by and between Lucy J. Mason and Hughes Mason, this 7th day of April, 1883, witnesseth, that in settlement of all matters of difference heretofore existing between them there is found to be a balance due the said Lucy J. Mason, from the said Hughes Mason, of four hundred dollars; he, the said Hughes Mason, agrees to pay the said Lucy J. Mason," etc.

This paragraph does not aver that this agreement of settlement was fraudulently procured, nor does it seek a reformation of the contract. It simply avers a mistake. A naked averment of mistake, without seeking a reformation of the contract, can not avoid the defence created by the agreement. *King v. Enterprise Ins. Co.*, 45 Ind. 43.

This is the rule as applicable to defences dependent upon the correction of mistakes in written agreements, and it would seem that if such correction is necessary, in order to enable a plaintiff to recover, the application for such reformation should be made in the complaint, and not by the reply. There was, therefore, no error in this ruling.

The appellant's husband died in April, 1880, and at that time she owned a hotel, livery stable, a store-room, two offices, and 130 acres of land. The business of the hotel and livery stable was conducted by her until the 9th day of April, 1883. During this time the appellee, who is her son, occupied the store-room as a dry goods merchant, received all the proceeds of the hotel and livery barn, furnished everything needed, and was at all expense in carrying on the business and in repairing the property. On the 9th of April, 1883, the contract of settlement was made, and in August thereafter this suit was brought to recover the rent of such store-room, rents received for such offices, money received from a sale of the appellant's land, and such money as he had received from the hotel and livery business. The appellant did

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not keep an account of the money received by the appellee from either source, but relied upon him to keep the account. She, however, kept an account for four months of one year, and testified that these were average months during the entire time. The proceeds during this time amounted to \$100 per month, and the appellant contends that this evidence was sufficient to charge the appellee with such sum per month during the entire time, though no evidence was offered that he received any specific amount. The court charged the jury that it was necessary for the appellant to trace the specific amounts to the appellee's hand, and this charge, it is insisted, was wrong.

The appellant also contends that the court erred in its charges as to the binding character of the agreement of settlement, and in excluding evidence as to what was embraced in such settlement.

This may be conceded, and yet it does not follow that the judgment must be reversed. If these rulings are deemed erroneous, it is upon the assumption that the settlement does not embrace the items mentioned in the complaint, and that the general proof offered entitled the appellant to recover the full amount which the proof tended to establish. Thus considered, the appellant was entitled to recover, according to her own testimony, and none was different, for store-room \$450, receipts from hotel and livery \$3,900, money from other sources \$415, and from sale of land \$700, in all \$5,465, less \$250, paid her upon the settlement, leaving a balance of \$5,215.

The appellee, in support of his claim, testified that the appellant was indebted to him for money paid by him to various persons, for repairs made upon the store building and dwelling, for labor performed in carrying on the hotel and livery business, and for premiums, taxes, etc., \$2,548, and for goods, groceries, and feed for livery stable, \$3,008.56, in all \$5,548.54. An itemized statement of these various articles was produced, and the testimony of the appellee that he had fur-

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nished them to the appellant was undisputed. The appellant, according to this record, was not called as a witness in relation to any of these items, nor was the appellee even cross-examined as to them. His testimony appears in a narrative form, and is not disputed by any one. It will thus be seen that if the agreement of settlement is entirely ignored, and the general proof is deemed sufficient to establish the appellant's claim, and the same is allowed in full, yet, as the appellee's undisputed claim exceeds in amount the appellant's by several hundred dollars, she was not entitled to recover anything in this action. Under the evidence, it was the duty of the jury to allow the appellee's claim, and if they did, as we must assume, the appellant was not entitled to any recovery, though her full claim was allowed. As the appellant, upon this record, was not entitled to recover anything, the rulings named, though erroneous, did not injure her. Had the appellee's claim been controverted, the questions would have presented themselves differently. As it was not, it does not appear that the appellant was injured by these rulings, and, therefore, they furnish no cause for a reversal of the judgment.

For these reasons we think there is no available error in the record, and that the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the appellant's costs.

Filed April 8, 1885; petition for a rehearing overruled June 12, 1885.

No. 11,896.

ICE v. BALL ET AL.

CONTRACT.—*Exchange of Lands.—Execution of Deeds.—Oral Agreements.—*
Merger.—Where parties negotiate with each other for an exchange of lands, and such negotiations are finally consummated by the execution and interchange of deeds, all oral covenants or agreements of the par-

102	42
137	47
109	42
141	263
143	614
102	42
146	87
102	42
150	432
152	580
102	42
180	180
102	42
162	491

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ties, in relation to their respective lands, which preceded or accompanied the execution of such deeds, are so merged therein that no action can thereafter be maintained on any such oral covenant or agreement for any alleged breach thereof.

PLEADING.—*Complaint.*—*Answer.*—*Demurrer.*—*Intervening Errors.*—Where the complaint does not state a cause of action, it is immaterial whether a paragraph of answer is good or bad on demurrer, for a bad answer is good enough for a bad complaint. In such case, where the plaintiff appeals, intervening errors are harmless and afford no ground for reversing the judgment.

From the Henry Circuit Court.

J. Brown and *W. A. Brown*, for appellant.

D. W. Chambers and *J. S. Hedges*, for appellees.

Howk, J.—In this case the appellant, Ice, the plaintiff below, alleged in his complaint that, on the 25th day of August, 1882, he and the appellees, Sarah Ball, Sarah A. House and Thomas House, entered into an agreement whereby the appellees agreed to convey to appellant, by deed in fee simple, certain described real estate in Henry county, Indiana, in consideration whereof the appellant agreed to convey to appellee Sarah A. House, the wife of Thomas House, and daughter of Sarah Ball, certain other described real estate, in the same county and State; that at the date of such agreement there was a subsisting and outstanding mortgage upon the real estate, so agreed to be conveyed to appellant, for the sum of \$340, with eight per cent. interest, executed by the appellees to the State of Indiana for the use of its common school fund, dated August 19th, 1881; that it was also agreed by the appellees, as a part of such contract, that they would cause such mortgage to be released from the land, so agreed to be conveyed to appellant, by either paying it off or by causing such mortgage to be removed and placed upon the land so agreed to be conveyed by appellant to appellee Sarah A. House; that to effectuate the latter part of such agreement it was further agreed that appellant should convey by warranty deed, in fee simple, the real estate to be conveyed by him to appellee Sarah A. House, and that the appellees would

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make a like conveyance to appellant of the land so to be conveyed to him, and that appellee Sarah A. House would withhold the recording of her deed until after appellees should have effected the removal or cancellation of such mortgage and caused the land so conveyed to the appellant to be released therefrom; that, in pursuance of such agreement, the appellant and the appellees executed to each other their warranty deeds for the respective tracts of land so agreed to be conveyed, and that each party took possession of the land so conveyed to him or her, and had since continued in possession thereof; that appellant had fully complied with his part of such agreement, but that the appellees had in part broken their agreement, in this, that they caused their deed to be recorded upon its delivery to Sarah A. House, and they failed to pay off the aforesaid mortgage, or to cause it to be in anywise released, or to place such encumbrance upon the land so conveyed to Sarah A. House, instead of the land so conveyed to appellant. Wherefore appellant demanded judgment for the amount of such school fund mortgage, and interest, to wit, for \$350, and that such judgment be declared a lien, as for purchase-money, upon the lands so conveyed to Sarah A. House, and that a decree should be rendered, to be enforced and collected as other judgments were enforced and collected, whenever the appellant should have paid off such school fund mortgage, and for other proper relief.

The cause was put at issue and tried by a jury, and a verdict was returned for the appellees, the defendants below, and over appellant's motion for a new trial judgment was rendered against him for appellees' costs.

A number of errors are assigned here by the appellant, but of these we will consider such only as his counsel have discussed in their elaborate briefs of this cause. It is first claimed in argument, on behalf of the appellant, that the court erred in overruling his demurrers to the third and fourth paragraphs of appellees' answer. In the third paragraph of their answer the appellees said that, at and before the time of the exchange

of lands mentioned in the complaint, and as a part of the consideration of the conveyance to appellees, the appellant guaranteed that the land he was about to convey to the appellees was free from all encumbrances, and that the title thereto was good, and such a title that the officers, who had charge of and loaned what was generally known as the common school fund, would take as security for a loan of such fund to the same amount as that of the mortgage mentioned in appellant's complaint; that appellant would cause such officers to make such loan, and that the mortgage mentioned in his complaint should remain on the land conveyed to appellant until he could procure the transfer of such mortgage to the land conveyed by him to the appellees, which he failed and refused to do. And the appellees said that appellant had not a good and unbroken chain of title to the land conveyed by him to appellees, and had not such a title thereto as the officers managing the common school fund would negotiate a loan thereof upon; that appellees made an effort to negotiate a loan of such fund upon such land and could not do so for any equal amount, on account of the defective title of the land so conveyed to them, and on no other ground; and that appellees made an effort to have such loan transferred from the land sold by them to appellant to the land conveyed by him to them, but failed and were unable so to do by reason of appellant's defective title to the land conveyed by him to appellees at the time of such conveyance.

In discussing the alleged insufficiency of this paragraph of answer the appellant's counsel say: "This answer is not good, for the defendants have no right to question their title while they are in possession under it. Mrs. House has her deed, containing full covenants, and is in quiet possession of the land, and she and her co-defendants are not in a condition to resist this case while they are holding on to their part of the bargain." This argument of counsel is double-edged, and lays bare the same defect in appellant's complaint, as it attempts to do in appellees' third paragraph of answer. It

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may be said of the complaint, in substantially the same language we have just quoted from plaintiff's brief, "This complaint is not good, for the plaintiff has no right to question his title while he is in possession under it. Mr. Ice has his deed, containing full covenants, and is in quiet possession of the land, and he is not in a condition to prosecute this cause while he is holding on to his part of the bargain." In truth, we think that whatever else may be said of the third paragraph of answer, it must be conceded that such paragraph is, at least, equally as good a pleading as the appellant's complaint.

We are of opinion that the demurrer to the third paragraph of answer ought to have been carried back by the court and sustained to the appellant's complaint, for we are sure that this complaint did not state a cause of action against the appellees, or either of them. It must be assumed, in the absence of any averment to the contrary, that the alleged agreement upon which the appellant declares in his complaint was an oral or verbal agreement between the parties in relation to the proposed exchange of their respective tracts of land. *Krutz v. Stewart*, 54 Ind. 178; *Langford v. Freeman*, 60 Ind. 46; *Goodrich v. Johnson*, 66 Ind. 258. It is shown by the averments of the complaint, that this alleged agreement was a part of the preliminary negotiations between the parties for the exchange of their lands, and was afterwards consummated by the execution of their respective deeds in accordance therewith. When these deeds were thus executed, it must be held, we think, that all oral negotiations or agreements, by or between the parties, which preceded or accompanied their execution, were merged therein, and that such deeds became and were the exclusive evidence of the only covenants and agreements in relation to their respective tracts of land by which the parties ultimately bound themselves. If the alleged oral covenant or agreement of the appellees, upon which the appellant sued in this action, was afterwards reduced to writing in their deed to him, then such writing would have been the

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foundation of his action, and the original deed, or a copy thereof, would have been a necessary part of his complaint. R. S. 1881, section 362; *Anderson School Tp. v. Thompson*, 92 Ind. 556.

If such oral covenant or agreement of the appellees was not set out in their subsequent deed to the appellant, it was so merged in such deed, under the law as heretofore stated, that he could not maintain any action thereon for any supposed breach thereof. So that, in any view of this case, we are clearly of the opinion that the appellant's complaint does not state facts sufficient to constitute a cause of action in his favor and against the appellees. It is wholly immaterial, therefore, whether the third paragraph of answer is good or bad, because even a bad answer is good enough for a bad complaint. This is settled by many decisions of this court. *Ætna Ins. Co. v. Baker*, 71 Ind. 102; *State, ex rel., v. Porter*, 89 Ind. 260; *Clawson v. Chicago, etc., R. W. Co.*, 95 Ind. 152.

This conclusion renders it unnecessary for us to consider any of the other errors of which complaint is made by the appellant. Where, as here, the plaintiff appeals, and it is shown by the record that he has no cause of action against the defendants, intervening errors, if any, must be regarded as harmless, and the judgment must be affirmed. *Fell v. Muller*, 78 Ind. 507; *Rawson v. Pratt*, 91 Ind. 9; *Clawson v. Chicago, etc., R. W. Co., supra*.

The judgment is affirmed, with costs.

Filed May 13, 1885.

 No. 12,136.

FRAKES v. ELLIOTT.

REAL ESTATE, ACTION TO RECOVER.—*Tenants in Common.*—*Eviction.*—*Undivided Interest.*—*Right to Recover.*—One tenant in common who is wrongfully evicted by a cotenant may maintain an action of ejectment to recover his undivided share of the land.

SAME.—*Statute of Limitations.*—In actions for the recovery of the possession of real estate, the statutory limitation is twenty years.

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From the Howard Circuit Court.

M. Bell and W. C. Purdum, for appellant.

J. C. Blacklidge, W. E. Blacklidge and B. C. H. Moon, for appellee.

ELLIOTT, J.—This case is here for the third time. When first here the principal points decided were: 1st. That one tenant in common may sue his cotenant for his undivided share of the land. 2d. A widow's interest can not be sold upon an administrator's petition for an order to sell land for the payment of the husband's debts, and that the order of the court assuming to direct the sale of the widow's interest was void because the court had no jurisdiction to make the order. *Elliott v. Frakes*, 71 Ind. 412. When the case was here the second time, the main points presented for decision and decided were: 1st. The possession of a tenant in common claiming the whole land will not make champertous a conveyance by the other tenant. 2d. An answer setting up an adverse possession must aver that the party entered in good faith, believing that he had a good title, otherwise he could not defeat a deed made by the true owner. *Elliott v. Frakes*, 90 Ind. 389. As these points were essential to the judgment delivered, and were considered and decided, they must be treated as constituting the law of the case. If the points had been merely incidental ones, not necessary to a decision of the case, and not decided, it would be otherwise. We accept, and incorporate in our decision, without further discussion, the rules declared in the previous decisions, and devote our attention to the questions which were not presented on the former appeals.

The amended complaint of the appellee alleges that on the 20th day of September, 1854, John Sipe died intestate, the owner in fee of eighty acres of land; that he left surviving him his widow, Elizabeth Sipe; that on the 19th day of February, 1856, Elizabeth Sipe died testate, the owner of an undivided one-third of the land of which John Sipe died seized;

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that by her will she devised the land to one Isaac Sipe, from whom the appellee bought an undivided one-sixth part, in July, 1876; that Frakes holds possession of the land and denies the plaintiff's right to possession. The prayer of the complaint is for possession of the one undivided sixth part of the land.

The amended second paragraph of the answer admits the allegations of the complaint, and alleges, by way of avoidance, that the appellee paid the merely nominal consideration of one dollar for the land, and received a quitclaim deed; that on the 20th day of April, 1857, the administrator of the estate of John Sipe, deceased, filed a petition to sell the land for the payment of the debts of the intestate; that due notices were given, an order of sale obtained, the land sold and bought by Frederick Zelloix on the 5th day of December, 1857, who at once entered into possession; that he held possession until February, 1864, when the defendant bought the land and paid therefor two thousand dollars; that the defendant obtained a warranty deed, and has since its execution held possession of the land; that no claim was made thereto by Elizabeth Sipe, Isaac Sipe, or the plaintiff, until this action was instituted on the 9th day of September, 1877. It is further alleged that the purchase by Zelloix and the purchase by the defendant were made in good faith and without notice of any claim of those through whom the plaintiff's title is derived; that "more than fifteen years had elapsed since plaintiff's cause of action accrued, and prior to the commencement of this suit; and that for more than eight years next before the bringing of this suit said Isaac Sipe and the plaintiff were over the age of twenty-one years, and under no legal disabilities." There is no difference between the first and second paragraphs of the answer, and we need not give any time to the latter paragraph.

It is obvious that the only question presented by this answer, and not decided in the previous decisions, is that of the

statute of limitations. The parties have made no question as to the form of the pleading, and we shall make none.

The action is for the recovery of real property, and is not a suit for partition. The allegations are such as make the complaint sufficient in an action of ejectment, for it is alleged that the plaintiff had the title in fee, and also had the right of possession; that the defendant has wrongfully ousted her from the possession of the whole land, and is wrongfully in possession, asserting ownership to the exclusion of the plaintiff. It was decided in this case when it was first here, as we have seen, that one tenant in common may maintain an action to recover possession of an undivided part of the land from a cotenant who wrongfully excludes him from possession. Here the tenant in possession claimed under a deed embracing the whole interest in the land, was in actual possession under that deed, and did deny the plaintiff's title. The case is fully within the rule laid down by our own decisions. *Ches-round v. Cunningham*, 3 Blackf. 82; *Doe v. Abernathy*, 7 Blackf. 442; *Nelson v. Davis*, 35 Ind. 474; *Bethell v. McCool*, 46 Ind. 303. The action is one for the recovery of the possession of real estate, and these cases govern it.

Counsel for the appellee in a very lengthy brief criticise some of the decisions of this court in which it was held that the fifteen year statute applies to suits to quiet title. The criticism was entirely unnecessary, and it is, perhaps, not improper to remark, entirely unsupported by reason or authority. The only question in the case is what statute applies to actions to recover real estate, and the counsel by whom, as it is recited, the brief was dictated, seems to have lost sight of the real character of his client's case. It is not a suit to quiet title, nor a suit for partition, but it is an action to recover possession of real estate. The great number of cases cited by the counsel have no bearing whatever upon the case as presented by the record, for the case presented by the record is that of an action to recover possession of real estate. There

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can be no doubt that the fifteen year statute does not apply to such a case.

The third paragraph of the answer does not present any question not decided by this and the former decisions. *Nutter v. Hawkins*, 93 Ind. 260, was a suit for partition, and not an action for the recovery of real estate, and the decision in that case does not govern here, for the statute, in explicit terms, provides that actions for the recovery of the possession of real estate may be brought within twenty years after the cause of action accrues. In the case cited the distinction between suits for partition and actions to recover the possession of real estate is expressly recognized, *vide* opinion, p. 265.

In the case before us the answer admits all the material facts stated in the complaint, and attempts to avoid the recovery sought, that of the possession of real estate, by interposing the statute of limitations. It is perfectly clear that the plea of the statute can not be good unless it pleads the lapse of time prescribed, and as the time prescribed is twenty years, and the answer pleads fifteen, it is logically impossible that it can be deemed sufficient.

Judgment affirmed.

Filed May 20, 1885.

No. 12,313.

WARTNER v. THE STATE.

CRIMINAL LAW.—Bill of Rights.—Trial by Jury.—Waiver.—Under section 13 of the Bill of Rights, in the Constitution of this State, in all criminal prosecutions the accused has the right to a public trial by an impartial jury, and this right he can not be deprived of, nor even waive unless such waiver is expressly authorized by statute.

SAME.—Capital Cases.—Jury Trial.—Punishment.—Discretion of Jury.—Statute Construed.—Under section 1821, R. S. 1881, the defendant in a capital case must be tried by a jury; and upon conviction of a capital offence, upon his plea either of guilty or not guilty, it is in the discretion of the jury alone, under the statute, to assess his punishment, either that he suffer death or be imprisoned in the State prison during life. Upon con-

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viction for such an offence the court is not authorized by any statute to assess the punishment without the intervention of a jury; and this is so even where the defendant interposes a plea of guilty.

From the Jasper Circuit Court.

F. W. Babcock and *S. P. Thompson*, for appellant.

F. T. Hord, Attorney General, for the State.

HOWK, J.—On the 8th day of January, 1885, an indictment containing three counts was duly returned into the court below, in each of which counts the appellant Weibern Wartner was properly charged with the commission of one and the same felony of murder in the first degree. Afterwards, at the same term, the appellant being in custody was brought into court, and upon arraignment, for plea to the first count of the indictment, said that he was guilty as therein charged. Thereafter, on the 21st day of January, 1885, it was shown by the record that “the court, having heard the evidence and being sufficiently advised in the premises, finds the defendant guilty on his plea of guilty, heretofore entered herein, as charged in the first count of the indictment, and assesses his punishment at death.” Upon this finding and no other, on the same day, the court adjudged that the appellant, Wartner, should suffer the penalty of death, in the statutory mode, on the 15th day of May, A. D. 1885.

It is very clear that the judgment of the court, in this cause, is wholly unauthorized by law and must be set aside and reversed as an absolute nullity. Section 13 of the Bill of Rights, in the Constitution of this State, provides as follows: “In all criminal prosecutions the accused shall have the right to a public trial by an impartial jury in the county in which the offence shall have been committed,” etc. The appellant’s right to a trial of this prosecution against him is his personal and constitutional right which he can not be deprived of, nor can he even waive such right unless such waiver is expressly authorized by statute. The appellant’s case, as charged in each count of the indictment, is a capital

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case; and, in such a case, there not only is no statutory authority for the defendant's waiver of his right to a trial by jury, but the statute declares that the trial thereof "must be by jury." In section 1821, R. S. 1881, it is provided as follows: "The defendant and prosecuting attorney, with the assent of the court, may submit the trial to the court, except in capital cases. All other trials must be by jury."

Under this section of the statute, it has been held by this court, and correctly so we think, that the constitutional right of a defendant in a criminal cause to a public trial by an impartial jury is a right which he may waive if he choose so to do, and if such waiver is authorized by statute. *Murphy v. State*, 97 Ind. 579. Where the defendant in a criminal case is authorized by statute to waive a trial by jury, the statute is strictly construed. Thus, it has been repeatedly held, that where such a statute would authorize the defendant in a criminal case to waive all right to a jury trial, it would not authorize him to consent to a trial by a jury of less than twelve jurors. *Brown v. State*, 16 Ind. 496; *Allen v. State*, 54 Ind. 461; *Moore v. State, ex rel.*, 72 Ind. 358.

In the case in hand, the record fails to show whether or not the appellant waived, or attempted to waive, his constitutional right to a trial by jury; but, as such a waiver is not authorized by statute in this case, the silence of the record on this point is wholly immaterial. Nor is it material that the record fails to show any objection or exception, by or on behalf of the appellant, to the trial of his case by the court or to any of the proceedings had therein. It is shown by the record that appellant's case is a capital case, and that the court, without the intervention of a jury, tried his case, found him guilty as charged and adjudged that he suffer the penalty of death. This the court was not authorized to do, nor was the appellant authorized to consent thereto by any law of this State. *Koerner v. State*, 96 Ind. 243. After the appellant's plea of guilty, the proceedings and judgment of the court are erroneous, and errors of so grave a character

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that he has the right to insist upon them here as affording substantial grounds for the reversal of the judgment. The law of his case, as declared in section 1904, R. S. 1881, is that for the felony, whereof he says he is guilty, he "shall suffer death or be imprisoned in the State prison during life, *in the discretion of the jury.*" In assessing his punishment the record shows that the court usurped and exercised a discretion which the statute has conferred upon the jury, and not upon the court. Under the statute the appellant had and has the right to have a jury say, in their discretion, which one of the two punishments he shall suffer.

The judgment is reversed and the cause is remanded with instructions to submit the same to a jury.

Filed May 12, 1885.

END OF NOVEMBER TERM, 1884.

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1885, IN THE SIXTY-NINTH
YEAR OF THE STATE.

No. 11,584.

VOGEL v. LEICHNER.

MARRIED WOMAN.—*Suretyship.*—A contract executed by a married woman is one of suretyship to the extent that the consideration was received by her husband or any other person, or that it went to pay a debt or liability for which neither she nor her property was bound.

SAME.—Whether a married woman is principal or surety will be determined, not from the form of the contract, nor from the basis upon which the transaction was had, but from the inquiry, was she to receive, in person, or in benefit to her estate, the consideration upon which the contract rests?

SAME.—A valid lien existed upon the real estate of V., a married woman. After the act of April 16th, 1881, went into force, she joined with her husband in the execution of bonds, and a mortgage on such real estate to secure the loan of a sum in excess of the amount of the lien. With the money thus borrowed the lien was discharged, and the surplus remaining was converted by the husband to his own use. On the face of the papers both husband and wife appeared to be principals, and the lenders dealt with them on that basis; yet, as between the husband and wife, it was understood that the latter was surety.

Held, that to the extent that the consideration of the loan was to be applied to the discharge of the existing lien on V.'s real estate, her con-

102	55
124	108
124	167
125	491
126	203
126	543
102	55
128	22
102	55
131	209
131	275
131	542
102	55
136	381
102	55
139	56
102	55
142	502
102	55
144	22
102	55
149	19
149	359
150	398
152	376
152	377
102	55
154	359
154	360
154	361
102	55
159	165
159	430
102	55
160	528
160	530
102	55
164	364
164	684

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tract was that of a principal; but as to the amount used by her husband which did not enure to her benefit, her contract was one of suretyship, and void.

SAME.—Burden of Proof.—In an action against a married woman upon her contract, the burden of proof is upon the plaintiff to show for what purpose she contracted, and that she either did, or was to, receive the benefit of it, either in person or estate.

From the Allen Superior Court.

L. M. Ninde, for appellant.

W. H. Coombs, R. C. Bell and S. L. Morris, for appellee.

MITCHELL, C. J.—The case before us arises on a bill to foreclose a mortgage executed by Veronica Vogel and her husband, Frank B. Vogel, and requires a consideration of the circumstances under which a married woman may be bound on a contract in which she joined with her husband.

We have carefully examined the evidence, all of which is in the record, and have arrived at the conclusion that all the facts necessary to a determination of the rights of the parties are presented by the special findings of the court.

From these it is disclosed that on the 1st day of November, 1882, Veronica Vogel, a married woman, was the owner of the real estate described in the mortgage in suit, she having derived it by descent from her father; that the land was then subject to a mortgage, dated the 11th day of February, 1879, in the execution of which she had joined with her husband to secure a debt due from him to the Hamilton Bank of Fort Wayne, on which there was due the sum of forty-two hundred dollars.

For the purpose of raising the money to discharge this encumbrance, and for other purposes, a loan was negotiated with the plaintiff for five thousand dollars, to secure which five several bonds, one of which fell due annually, of one thousand dollars each, with interest coupons attached, and the mortgage in suit, were executed by the husband and wife jointly.

It is found that in making the loan, and in the execution

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of the bonds, coupons and mortgages, the parties dealt on the basis that both Vogel and wife were principals, but that inasmuch as the money was borrowed for the use of Frank B. Vogel, as between him and his wife she was to be regarded as his surety, and it was so understood between the defendants at the time.

The court also found that of the sum borrowed, forty-two hundred dollars was at the time applied to the discharge of the debt and mortgage to the bank, and the residue was used by the husband for his own purposes, and that at the date of the hearing below there was due of principal, interest and attorney's fees to the plaintiff the sum of \$5,428.88, for the whole of which, upon conclusions of law stated, a decree was given against the wife's property.

It is now contended, on behalf of Mrs. Vogel, that as the debt, for the payment of which the money was borrowed, and to which it was applied, was the husband's, and that as the residue was received and applied to his use, the wife, as to the entire transaction, stood in the relation of surety, and that in consequence the contract falls within the inhibition of section 5119, R. S. 1881. If this is not so, it is argued, that at least to the extent that the money was received and used by the husband the contract is invalid.

Appropriate motions were made and exceptions taken by her counsel below to raise these questions.

As against this view, it is contended that, as it appears from the face of the bonds, coupons and mortgage, that both defendants contracted as principals, and as it is found by the court that they did so contract, and because it is not found that the appellee had knowledge that, as between themselves, the wife was in fact surety, she is thereby estopped from asserting that she sustained the relation of surety to all or any part of the debt under consideration.

Section 5 of the act of May 31st, 1852, provided as follows: "No lands of any married woman, shall be liable for the debts of her husband; but such lands and the profits

therefrom, shall be her separate property, as fully as if she was unmarried: *Provided*, That such wife shall have no power to encumber or convey such lands, except by deed, in which her husband shall join."

Under this statute it was uniformly held that a mortgage executed by the wife, her husband joining, to secure her husband's debt, was valid. *Frazer v. Clifford*, 94 Ind. 482, and cases cited.

By the act of 1879, relating to married women, it was provided as follows: "A married woman shall not mortgage or in any manner encumber her separate property acquired by descent, devise or gift, as a security for the debt or liability of her husband or any other person."

Under this statute it was held in *Frazer v. Clifford*, *supra*, that a mortgage executed by husband and wife to secure the husband's debt, on the wife's land, acquired by contract or purchase, was valid.

By the act of April 16th, 1881, which came in force September 19th, 1881, and which, so far as it affects the question under consideration, is embraced in R. S. 1881, from section 5115 to 5119, it was provided: Section 5115. "All the legal disabilities of married women to make contracts are hereby abolished, except as herein otherwise provided." Section 5116 is a substantial re-enactment of section 5 of the act of 1852. Section 5117 provides, among other things, "That she shall be bound by an estoppel *in pais*, like any other person." Section 5118 provides that in the conveyance of her own separate property she shall be bound by her covenants of title, and that on her official bond she shall be bound in like manner as a principal. Section 5119 provides as follows: "A married woman shall not enter into any contract of suretyship, whether as endorser, guarantor, or in any other manner; and such contract, as to her, shall be void."

Much subtle and refined discussion may be found on the subject of the power of married women, independent of statutory enactments to bind their estates, and whatever interest

might attach to a review of that subject, it would afford no especial aid in arriving at a correct conclusion in the case before us, as the statute above referred to must control in its decision.

The construction which the statute of 1852, relating to married women, received, was, that a married woman was entitled to the full and complete enjoyment of her separate property, the same as if she was unmarried, and whatever was necessary or proper to be done to secure to her such full and complete enjoyment, she might cause to be done, and make it a charge upon her estate, but she could make no executory contract whatever, not even for the services of a physician to minister to her during sickness. *Thomas v. Passage*, 54 Ind. 106, and cases cited. As we have already seen, she might encumber her real estate in the manner provided for the debt of a third person.

By the statute of 1879 the disabilities of the wife, as respects her contracts, were removed in regard to certain specified subjects, and she was prohibited from mortgaging her real estate acquired in the manner specified in the act for the debt of her husband or any other person. *Hans v. Shaw*, 91 Ind. 385 (46 Am. R. 607).

By the more comprehensive enactment of 1881, above referred to, the Legislature abrogated all the legal disabilities of married women except such as are expressly saved in the act. Appreciating the wisdom and policy of protecting them from the importunities or possible dictation of others, and to secure to them, or their estates, the benefit of all contracts which they might thereafter make, and to end all further contention on the subject, section 5119 wisely put an absolute inhibition upon the power of a married woman to enter into any contract of suretyship whatever, and declared all such contracts as to her void.

The intent of the statute was to remove her disabilities for her protection, and for the protection of her property, and not to enable her to contract burdensome obligations from

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which neither she nor her property would be benefited. Under this statute nothing remains for the courts, in the premises, except to determine in each case as it arises whether the contract was, or was not, one of suretyship, and, according as the fact may be ascertained, give effect to the intent of a plain and salutary statute enacted for the protection of the property of those who are, perhaps, accustomed to place too much reliance on others.

Whether a contract executed by a married woman is one of suretyship or not, will be determined by a consideration, of whether or not it was made by her or on her behalf, and upon a consideration moving to her or for the benefit of her separate estate.

To the extent that the consideration was received by her, or enured to her benefit or the benefit of her estate, she will be held to have contracted as principal. To the extent that the consideration was received by her husband, or any other person, or that it went to pay a debt or liability, for which neither she nor her property was bound, it will be held a contract of suretyship. *Saulsbury v. Weaver*, 59 Ga. 254; *Neal v. Hurt*, 63 Ga. 728. Where a mortgage is executed by a wife to secure the performance of a contract, to which she occupies the relation of surety, both the contract and the mortgage securing it will be held to be contracts of suretyship, and void within the terms of the statute. *Brandt Suretyship*, section 22; *Moffitt v. Roche*, 77 Ind. 48, and cases cited; *McCarty v. Tarr*, 83 Ind. 444; *Allen v. Davis*, 99 Ind. 216.

That the husband and wife both appeared on the face of the papers to be principals, or that the parties dealt on the basis that both were principals, is of no consequence. The wife had no power to deal as principal if in fact she was surety. Whether she was principal or surety will be determined not from the form of the contract, nor from the basis upon which the transaction was had, but from the inquiry, was the wife to receive, either in person or in benefit to her estate, or did she so receive, the consideration upon which the contract

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rests? and, as was said by CAMPBELL, J., in *West v. Laramay*, 28 Mich. 464, "the burden of proof is on the plaintiff to show for what purpose she contracted, and to prove it clearly."

The statute is in derogation of the common law, and, as its design, as we interpret it, was to secure to married women the benefit of their contracts, and not to remove their disabilities so as to enable them to make contracts for the benefit of others, the burden of proof is upon the person making a contract with her, in which she might be surety, to show that she either did or was to receive the benefit of it. *Tracy v. Keith*, 11 Allen, 214.

At common law no right of action existed against a married woman to enforce an executory contract. The statute has enacted some exceptions to the common law rule, so that in certain cases her contracts may be enforced against her. Where a right or remedy is given that did not exist at common law, the facts necessary to show that the case is within the right given must be alleged and proved. 1 Works Pr., p. 249.

In the case of *Way v. Peck*, 47 Conn. 23, it was held, that where a married woman signed a note with her husband, the burden of proof was on the plaintiff to show that the circumstances were such that under the statute she was bound. This is a just and reasonable rule. To hold otherwise would be practically to fritter away the whole beneficial purpose of the statute. If nothing more is necessary, in order to bind the wife on her joint contract with her husband, than that she sign a note or other obligation with him, in such form as that both appear to be principals, or that the creditor should deal on the basis that both are principals, without further inquiry or concern as to the fact, then the protection of married women afforded by the statute is a myth, and the removal of her disabilities a snare.

Before the enactment of the last statute, her general engagements were binding only in certain specified instances; all

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her real estate was secure from encumbrance for the debts of others except that acquired by contract or purchase. If now all general engagements are binding on her, whether executed by her separately or jointly with another, except where she can prove that the creditor had knowledge of the fact that she was surety at the time the contract was entered into, her condition is rendered worse instead of better.

The statute affords ample means for the protection of the person who becomes her creditor; it provides that she shall be subject to an estoppel *in pais* as any other person. This does not mean that she is to be estopped by the mere form of the contract, without more. She is to be estopped as any other person, by causing the lender to believe that a state of facts exists which does not, or that the transaction is one thing, while in fact it is another. A person may not deal with a wife, with knowledge of the fact, and of her want of power to bind herself for the benefit of others, and relying upon the form of the contract, assert that he had no knowledge of her actual relation to the transaction. He should have inquired. After inquiry he may govern himself according to the facts or the information received from her. If she neither contracted for, nor received either in person or estate, the consideration of the contract, signing it merely at the direction or for the benefit of another, then no matter what device may have been employed in its form, or the basis upon which the parties acted, it is nevertheless a contract of suretyship, and void. *Veal v. Hurt, supra*; *Athol Machine Co. v. Fuller*, 107 Mass. 437.

Of course, it is not meant by what has been said that the contract must in the end have resulted beneficially to the wife. Having been relieved of her disabilities to the extent that she is enabled to contract for her own benefit, and the benefit of her estate, she must be allowed to act on her judgment concerning what will benefit her or her estate, and when she contracts for the purpose, and upon the consideration that she or her property shall be benefited, and is principal in fact as well

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as in form, she will not be permitted to say, as against such contract, that she has been disappointed in the result, and is, therefore, a surety.

When, however, the consideration and benefit of a contract in which she has joined moves to another, and was so intended, then the barrier of the statute is interposed for her protection, unless by her conduct she is estopped from invoking its aid.

Applying the foregoing conclusions to the facts in hand, it results that to the extent that the consideration of the loan was to be applied to the discharge of the encumbrance on Mrs. Vogel's estate, it was a contract for her benefit, and for the benefit of her estate, and was not one of suretyship. *Fitzpatrick v. Papa*, 89 Ind. 17.

While it is true that the debt which was to be, and was paid with part of the money borrowed, was the debt of the husband, it was nevertheless a valid encumbrance on her property, and it would not do to say that a wife whose property was encumbered, even though for the debt of a third person, could not contract a valid debt for the purpose of saving her estate from possible sacrifice.

The finding of the court that the wife should be regarded as surety between herself and husband, and that it was understood between them that she should be surety, can not control as against the fact that it was understood that so much of the money as was necessary should be applied to the discharge of the encumbrance on her land, and that it was actually so applied. *Perkins v. Elliott*, 23 N. J. Eq. 526.

In the case above cited, it was held that a wife would be held bound as not being a surety, on a note executed jointly with her husband for a loan of money with which to discharge a mortgage in which she had joined, and which bound her contingent interest in the land of her husband.

To the extent that the money was borrowed for, and applied to, the use of Frank B. Vogel, Veronica Vogel was his surety, and the contract was a contract of suretyship.

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Upon the facts found, the conclusions of law should have been that there was due the plaintiff forty-two hundred dollars, with interest at seven per cent., according to the terms of the bonds and coupons, from November 1st, 1882, to the date of the finding, and one hundred and seventy-one dollars and forty-three cents for attorney's fees.

The judgment is reversed, with directions to the court below to state conclusions of law and render judgment and decree according to the foregoing opinion.

Filed June 11th, 1885.

No. 12,329.

LUCAS v. HAWKINS, SHERIFF.

PLEADING.—*Judgment.*—*Jurisdiction.*—In pleading the judgment of a court of general jurisdiction, it is unnecessary to aver the facts showing that the court had jurisdiction.

SAME.—*Habeas Corpus.*—*Return.*—To a writ of *habeas corpus*, a return, setting up a judgment of the circuit court, is good.

BASTARDY.—*Trial in Defendant's Absence.*—*Judgment.*—*Case Overruled.*—If a prosecution for bastardy be tried in the absence of the defendant, by reason of escape, and the finding be against him, the statute, section 986, R. S. 1881, requires that the court shall commit him to jail if he do not replevy the judgment, and he may to that end be arrested upon a bench warrant. *Patterson v. Pressley*, 70 Ind. 94, overruled.

From the Hamilton Circuit Court.

F. M. Trissal, for appellant.

T. J. Kane and *T. P. Davis*, for appellee.

NIBLACK, J.—On the 7th day of May, 1885, which was during the April term, 1885, of the Hamilton Circuit Court, Wiley Lucas presented to that court his petition, representing that he was restrained of his liberty and confined in the common jail of Hamilton county, by Elihu Hawkins, sheriff of that county, upon the pretence, as he was informed and believed, that he is the father of a child alleged to be illegitimate, but averring that he had not been arrested and was not then imprisoned upon any indictment, warrant, lawful

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process, or valid judgment against him. Wherefore he demanded that a writ of *habeas corpus* be issued to the said Hawkins as such sheriff, and that the cause of his restraint might be inquired into with a view to his discharge from imprisonment. A writ of *habeas corpus* was accordingly issued to Hawkins, who made return that in proceedings had before a justice of the peace of Hamilton county, in a case in which the State of Indiana, on the relation of one Alice Minor, was plaintiff, and the said Wiley Lucas was defendant, the said Lucas was adjudged by the justice to be the father of the bastard child of which the relatrix was the mother, and that in default of a recognizance to appear in the circuit court he was committed to the county jail; that afterwards the said Lucas escaped from the custody of the officer having him in charge, and went at large; that thereafter at the February term, 1885, of the Hamilton Circuit Court, and in the absence of the said Lucas, a judgment was rendered as follows:

“The State of Indiana, *ex rel.* Alice Minor, *v.* Wiley Lucas. Comes now the relatrix and moves the court for a judgment upon the finding of the court, which motion is now sustained. It is therefore adjudged and decreed by the court that the plaintiff recover of the defendant the sum of six hundred dollars, payable in instalments to said relatrix, Alice Minor, for the support of the bastard child mentioned, as follows, to wit: One hundred dollars in thirty days from this date; one hundred dollars on the 10th day of February each year for five years hereafter; and said defendant is required to replevy this judgment by good freehold surety, or, in default thereof, that he stand committed to the county jail.”

That after the rendition of such judgment, the Hamilton Circuit court issued a bench warrant to him, the said Hawkins, as sheriff of his county, commanding him to arrest the said Lucas and have him immediately before the court to answer the charge of bastardy preferred by the said Alice

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Minor, and to abide the order of the court therein; that he Hawkins, as such sheriff, held the said Lucas in his custody under the commitment of the justice, and under the judgment herein above set out, as well as under the bench warrant above referred to, awaiting the order of the court in the premises.

The petitioner thereupon filed exceptions to the sufficiency of the return, but his exceptions were not allowed. He then moved that, upon the facts stated in the return, he be discharged from the custody of Hawkins, and that motion was also overruled.

Error is assigned here upon the refusal of the circuit court to allow the petitioner's exceptions to the sheriff's return, and upon the overruling of his motion to be discharged from custody.

Section 979, R. S. 1881, provides that upon the arrest of a person charged with bastardy, or upon the return of the warrant for his arrest that he can not be found, the justice, before whom the complaint was filed, shall proceed to hear and determine the matters charged in the complaint. If the justice shall adjudge the defendant to be the father of the bastard child, he shall, if the defendant be in custody, require him to give bond, with sureties, to appear at the next term of the circuit court of the county to further answer the complaint against him, and shall transmit such bond, together with a transcript of the proceedings and other papers in the cause, to the clerk of such circuit court, and if such defendant shall fail to give bond as required, such justice shall commit him to jail until discharged by law. The cause will then stand for trial in the circuit court as a civil action. See, also, R. S. 1881, sections 981 and 983. Section 986, of the same statutes, further provides that, "If the defendant shall not have been arrested, or has escaped after arrest, such trial shall proceed in his absence; and if he be adjudged the father of such child, the justice shall transmit the papers and a transcript of such judgment, without delay, to the clerk of

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the circuit court of the proper county, who shall file and docket the same for trial; and such cause shall be heard and determined by such court in the same manner as if such defendant were present." Section 992 defines the kind of judgment which the circuit court shall render in case the verdict or finding shall be against the defendant, and directs that if the defendant shall fail to pay or replevy such judgment, he shall be committed to the jail of the county to await the further action of the circuit court.

It is claimed, on behalf of the petitioner, that the return of Hawkins, the respondent, was defective, in not averring that the justice, before whom the proceedings in this case were commenced, had transmitted a transcript of the proceedings taken before him, and other papers in the cause, to the clerk of the circuit court, and that there was a trial and finding against the petitioner in that court, upon which the judgment set out might have been properly rendered; that these were jurisdictional facts necessary to the validity of the judgment in question, and hence ought to have been shown affirmatively by the respondent's return; that in the absence of such a showing the presumption was against the jurisdiction of the circuit court to render such a judgment, and that for that reason the petitioner was entitled to his discharge upon the facts alleged in the return. But the authorities do not sustain the doctrine contended for. Hurd on Habeas Corpus, at page 366, states the rule as applicable to the presumptive validity of legal proceedings in courts of general jurisdiction as follows: "If the record is silent as to the jurisdictional facts, they will be presumed to have been duly established; but such presumption may be rebutted by extrinsic evidence," requiring only that jurisdictional facts shall be affirmatively shown in support of judgments of courts of inferior jurisdiction.

Church on Habeas Corpus, at section 267, states the same rule in these words: "Superior courts are presumed to act by right, and not by wrong, and their acts and judgments are

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consequently self-sustaining and conclusive, unless plainly beyond the jurisdiction of the tribunals from whence they emanate," and then quotes with approval from the old case of *Peacock v. Bell and Kendal*, 1 Saunders, 73, the statement that "nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so; and on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged." The same doctrine is announced and approved by this court by the recent case of *Smith v. Hess*, 91 Ind. 424, and is too well recognized to require an elaborate citation of authorities to maintain it.

The necessary inference at the hearing of this case, therefore, was that the Hamilton Circuit Court had jurisdiction to render the judgment made a part of the sheriff's return.

It is insisted, nevertheless, upon the authority of the case of *Patterson v. Pressley*, 70 Ind. 94, that the circuit court had no power to order the petitioner to be committed to jail, in default of either paying or replevying the judgment, when he was not present and in custody at the time the judgment was rendered.

When literally construed, the interpretation thus placed upon the case of *Patterson v. Pressley*, *supra*, is not, perhaps, an unreasonable interpretation, but it is obvious that when that cause was considered, the attention of this court was not called to section 986, herein above set out. If it had been, a different conclusion would probably have been reached. At all events, upon a reconsideration of that case we do not feel justified either in approving or following it. Taking that section, in connection with all the other sections of the statute having relation to prosecutions for bastardy, the inference appears to us to be plain that, upon a verdict or finding against him, a circuit court may render the same kind of a judgment against a defendant in a prosecution for bastardy, when he is absent upon an escape, as it may do when he is in custody, and may then bring him into court upon a bench warrant as

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a means of requiring him to abide by, and perform, the judgment against him.

The judgment appealed from is affirmed, with costs.

Filed May 25, 1885.

No. 12,123.

HARBAUGH ET AL. v. ALBERTSON.

102	60
129	428
102	60
135	374

REPLEVIN BOND.—*Justice of the Peace.*—*Consanguinity.*—It is no defence to an action against a surety upon a replevin bond, given in proceedings before a justice of the peace, that such justice was related, within the sixth degree of consanguinity, to all the parties to the action. •

JURISDICTION OF JUSTICE.—*Estoppel.*—Where a party voluntarily submits the jurisdiction of his person to a justice of the peace who has jurisdiction of the subject-matter of the suit, he will not be permitted afterwards to controvert the justice's jurisdiction of his person.

SAME.—*Surety.*—Where, in replevin proceedings before a justice of the peace, a surety on the replevin bond by his execution thereof has enabled the plaintiffs to obtain possession of the property in controversy, he will be estopped from setting up as a defence to an action on the bond, that the justice before whom the action was commenced, had no jurisdiction over the persons of the parties.

From the Hamilton Circuit Court.

L. O. Clifford, J. A. Roberts and T. E. Boyd, for appellants.
W. Neal and J. F. Neal, for appellee.

HOWK, J.—The only error assigned by the appellants, the plaintiffs below, upon the record of this cause, is the overruling of their demurrer to the second paragraph of appellee's answer.

It is necessary, we think, to a proper understanding of this case, and of the questions presented therein for decision, that we should first give a summary of the facts stated by the appellants, in their complaint, as constituting their cause of action against the appellee Albertson and his co-defendant, one George W. Harbaugh.

Appellants alleged that, on July 19th, 1883, in an action

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then pending before Samuel T. Dunham, Esq., a justice of the peace of Jackson township, in Hamilton county, wherein George W. Harbaugh was plaintiff and the appellants herein were defendants, George W. Harbaugh, having filed his affidavit and complaint in replevin, before such justice, also filed therein his bond with appellee Albertson as his surety therein, in substance, as follows:

“STATE OF INDIANA, HAMILTON COUNTY, ss:

“We, George W. Harbaugh and William Albertson, are bound unto Clarissa Harbaugh and Thomas J. Harbaugh in the penal sum of one hundred dollars, under the conditions following: Whereas, the said George W. Harbaugh has this day filed with Samuel T. Dunham, a justice of the peace of Jackson township, Hamilton county, Indiana, a complaint against Clarissa Harbaugh and Thomas J. Harbaugh, for the recovery of one hundred and fifty dozen of wheat in the sheaf, and he is about to take out a writ to replevin the same: Now, if said George W. Harbaugh shall prosecute his complaint to effect, and return said wheat to said Clarissa Harbaugh and Thomas J. Harbaugh, if judgment of return be awarded them, and pay all damages awarded them in said cause, then this bond shall be void. Witness our hands and seals this 19th day of July, 1883.

“(Signed)

G. W. HARBAUGH.

“WM. ALBERTSON.”

And appellants alleged that such bond was then duly approved by such justice, and a writ of replevin was then duly issued to a constable of Jackson township, who, by virtue thereof, seized one hundred and fifty dozen sheaves of appellants' wheat, in the field and barn, and delivered the same to George W. Harbaugh; that such justice issued process, requiring appellants herein to appear before him, on July 25th, 1883, and answer such complaint in replevin; and such process was duly served on them; that on the day named the parties appeared before such justice, and, on appellants' application, the venue of the cause was changed from before

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him, and it was duly sent to another justice of the peace of such township, who was competent to try such cause; that before the latter justice, on August 10th, 1883, a trial of such cause was had, resulting in a judgment that George W. Harbaugh was entitled to such wheat; that, within the time allowed by law, the appellants herein duly appealed from the judgment of such justice to the Hamilton Circuit Court; that, at the November term, 1883, of such circuit court, such proceedings were had in such cause, as that it was dismissed by the court for the want of prosecution.

And the appellants averred that the defendants in this suit had not, nor had either of them, returned such wheat to the appellants, but that the defendant George W. Harbaugh had threshed such wheat and converted the same to his own use, to appellants' damage in the sum of \$100, which sum the defendants had not paid, nor offered to pay to the appellants; that the proceedings in such replevin suit were wrongful and oppressive; and that the grounds of the replevin, alleged in the affidavit and complaint therein, were untrue as the plaintiff in that suit well knew; by reason of all which appellants were damaged \$100. Wherefore, etc.

In the second paragraph of his separate answer to the foregoing complaint, the appellee Albertson alleged that the bond in suit was invalid and void, for the following reasons, namely: That such bond was executed in a pretended legal proceeding before Samuel T. Dunham, a justice of the peace of Hamilton county, and that all the parties to such proceedings, both plaintiff and defendants, were related to such justice of the peace, within the sixth degree of consanguinity; and such justice attempted to take and approve such bond, notwithstanding the relationship so existing between him, such justice, and the parties to such pretended suit.

The question for decision in the case may be thus stated: Are the facts alleged in the foregoing answer, and admitted to be true by the demurrer, sufficient in law to constitute a

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good defence, in appellee's favor, in bar of the appellant's action? We are of opinion that this question must be decided in the negative. The paragraph of answer proceeds upon the theory that the justice of the peace before whom the action of replevin was commenced, by reason of his relationship by blood to the parties to such suit, had no jurisdiction of the cause, and that the replevin bond, taken and approved by such justice in such cause, was therefore invalid and void. It may be conceded that such justice of the peace, by reason of his alleged relationship to the parties to such action of replevin, had not and could not acquire jurisdiction of the persons of such parties. Section 1433, R. S. 1881. But it by no means follows from this concession that such justice did not have full and complete jurisdiction of the subject-matter of such action of replevin, and might not, therefore, take and approve such replevin bond therein. In the case under consideration, there is no pretence that the justice of the peace, before whom such action of replevin was commenced, did not have full and complete jurisdiction of the subject-matter of such action. But the surety of the plaintiff, in such replevin suit, who, by commencing such suit before such justice of the peace, had voluntarily submitted his person to the justice's jurisdiction, now claims in the second paragraph of his answer that the replevin bond, executed by him to enable such plaintiff to obtain possession, as by means thereof he did, of appellants' sheaves of wheat, is invalid and void and of no binding force upon such surety, because he says that such justice could not, by reason of his relationship within the sixth degree of consanguinity to all the parties to such suit, take and approve such bond. This claim is made by the appellee, as such surety, after the plaintiff in such replevin suit had, by means of the appellee's execution of the replevin bond now in suit, obtained possession of the appellants' wheat and had converted such wheat to his own use.

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We are of opinion that the appellee can not be permitted to avail himself of such a defence in a court of even-handed justice, to defeat the appellants' action upon such replevin bond to recover in damages the value of their wheat. The case of *Sammons v. Newman*, 27 Ind. 508, is an authority in point. That case, like the one under consideration, was an action upon a replevin bond. The defendants claimed in bar of the action that the bond in suit was void, because, at the time it was executed, there was no action pending wherein the execution of the bond was authorized. It was held by this court, that where the plaintiff in replevin has obtained possession of the property under his writ, neither he nor his sureties can be permitted to allege, in defence of an action upon the bond, that no suit was pending when the bond was executed. The court there said: "To allow them to avoid liability on their bond upon that ground, would be to give judicial sanction to the perpetration of a palpable fraud upon the other party. By the bond, the plaintiffs in that suit obtained the possession of the property. Shall they now be permitted to say, 'we had no replevin suit pending, the sheriff had no right to take the property and deliver it to us, the bond was unauthorized and we are not bound?' Nor are the sureties in any better position in law to controvert the pendency of the replevin suit."

The case of *Caffrey v. Dudgeon*, 38 Ind. 512 (10 Am. R. 126), cited and relied upon by appellee's counsel, as supporting the ruling below, is not in point here, because, in that case, as is shown by the opinion of the court, the justice of the peace before whom the replevin suit was commenced, and who took and approved the replevin bond, had no jurisdiction of the subject-matter of such suit. In that case this court cite with approval the previous case of *Sammons v. Newman*, *supra*. After stating the point decided in the previous case, as we have heretofore stated it in this opinion, the court said: "There can be no doubt that the ruling in said case was cor-

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rect upon the facts of that case, but it can not be regarded as authority in the case under consideration. In that case the court had full and undoubted jurisdiction of the subject-matter of the suit, * * * * while in the case under consideration, the court had no jurisdiction of the subject-matter of the action; and in such a case the service of a summons or the voluntary appearance of the defendant to the action could not confer jurisdiction on the justice of the peace over the subject-matter."

In the case of *Trueblood v. Knox*, 73 Ind. 310, which was an action upon a replevin bond taken and approved by a justice of the peace, it was claimed by the defendants that the bond in suit was void, because the penalty thereof was less than double the value of the property, the return of which it was given to secure. It was held by this court that while, perhaps, this objection to the replevin bond might have been urged as a reason for the dismissal of the replevin suit before the trial thereof, "it by no means follows," says the court, "that such an objection could be set up as a defence in a suit upon the bond. On the contrary, upon every principle of fair dealing and of reciprocal obligation, the appellee was precluded from setting up the insufficiency of the penalty of the bond as a defence, after the writ of replevin had been issued, and the possession of the property obtained upon it."

In *Carver v. Carver*, 77 Ind. 498, the action was upon a replevin bond, which had been taken and approved by a justice of the peace. The defence was that the bond sued on was not in a penalty double the value of the property sued for, and was therefore void, and gave the justice no jurisdiction to issue the writ of replevin upon which such property was seized. It was held that the facts stated constituted no defence to the action on the bond. The court said: "The principal obligor tendered the bond in suit to the justice as being such as the law required, and thus secured the writ which put him in possession of the personal property of an-

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other. The plainest principles of justice require that neither he nor his sureties should be permitted to defend against the bond upon the ground that a sufficient penalty was not provided. * * * * There can be no doubt that the case is one to which the doctrine of estoppel fully and justly applies." *Waddell v. Bradway*, 84 Ind. 537; *Fawcner v. Baden*, 89 Ind. 587.

In the case at bar we are of opinion that the appellee is and ought to be estopped, in equity and good conscience, from setting up the facts stated by him in the second paragraph of his answer, in bar of the appellants' action. Having by his execution of the bond in suit enabled his co-defendant to get possession of, and convert to his own use, the appellants' wheat, the appellee ought not to be permitted to escape liability for the value of such wheat, upon the ground stated in such second paragraph of answer, when the record shows that his co-obligor and principal in such bond had voluntarily submitted his person to the jurisdiction of such justice of the peace. It is well settled that a party may voluntarily submit the jurisdiction of his person to a justice of the peace, who has jurisdiction of the subject-matter of the suit; and that, when this has been done, such party will not be permitted afterwards to controvert the justice's jurisdiction of his person. *Ludwick v. Beckamire*, 15 Ind. 198; *Nesbit v. Long*, 37 Ind. 300; *Mayes v. Goldsmith*, 58 Ind. 94.

Our conclusion is that the circuit court erred in this case in overruling the appellants' demurrer to the second paragraph of appellee's answer.

The judgment is reversed, with costs, and the cause is remanded, with instructions to sustain the demurrer to the second paragraph of answer, and for further proceedings in accordance with this opinion.

Filed May 25, 1885.

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No. 11,070.

THE FOUNTAIN COUNTY COAL AND MINING COMPANY v.
BECKLEHEIMER ET AL.

DEED.—*Rule in Shelley's Case.*—*Conveyance to Class.*—*Construction of words "Present Heirs."*—A deed with an introductory clause reading thus: "This indenture witnesseth, that Isaiah Ferguson, in consideration of natural love and affection which he bears to his daughter Nancy West and her present heirs, and the sum of five dollars, the receipt whereof is hereby acknowledged, does give, grant and convey to the said Nancy West and her present heirs forever," and a *habendum* reading as follows: "To have and to hold the same to the said Nancy West and her present heirs forever," does not, at common law, vest a fee in the grantee expressly named therein.

SAME.—*Fee in Lands.*—*How Created at Common Law.*—At common law an estate in fee could only be created by the use of the term "heirs" in its technical sense, and when there were superadded words clearly showing that the word was not used in its technical sense, an estate in fee was not vested in the grantee, nor could a fee tail be created without the employment of the word "heirs" in its technical signification.

SAME.—*Conveyance to Several.*—*What Estates Grantees Take.*—Where an estate is granted to several persons, and their respective interests are not specifically designated, they take jointly.

From the Fountain Circuit Court.

L. Nebeker and *H. H. Dochterman*, for appellant.

T. F. Davidson and *C. E. Booe*, for appellees.

ELLIOTT, J.—This controversy turns upon the effect of a deed executed by Isaiah Ferguson to his daughter, Nancy West, who was at the time it was executed, a widow with six children. The introductory part of the instrument reads thus: "This indenture witnesseth that Isaiah Ferguson, in consideration of natural love and affection which he bears to his daughter Nancy West and her present heirs, and the sum of five dollars, the receipt whereof is hereby acknowledged, does give, grant and convey to the said Nancy West and her present heirs forever, the following real estate:" Here follows a description of the land, and the deed then proceeds thus: "To have and to hold the same to the said

109	76
127	340
127	309
102	76
131	128
131	308
102	76
124	445
136	140
102	76
143	476
102	76
150	180

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Nancy West and her present heirs forever. The grantor, his heirs and assigns covenanting with the grantee, her present heirs and assigns, that the title so conveyed is free, clear and unincumbered."

The contention of the appellant is that the deed vested in Nancy West an estate in fee simple, and this involves the ruling question in the case.

Our decisions establish the doctrine that the rule in Shelley's Case is the law of the State, and by them we are bound. *Ridgeway v. Lanphear*, 99 Ind. 251; *Shimer v. Mann*, 99 Ind. 190; *Maxwell v. Featherston*, 83 Ind. 339; *Gonzales v. Burton*, 45 Ind. 295; *Andrews v. Spurlin*, 35 Ind. 262; *McCray v. Lipp*, 35 Ind. 116; *Nelson v. Davis*, 35 Ind. 474; *Siceloff v. Redman*, 26 Ind. 251; *Doe v. Jackman*, 5 Ind. 283; *Sorden v. Gatewood*, 1 Ind. 107. If, therefore, the case is within that rule the appellant must prevail. The question is thus narrowed to this: Is the case within the rule?

It is an axiomatic principle that no person in life can have heirs; heirs apparent or presumptive there may be, but not legal heirs. The deed could not, therefore, have operated to convey land to the "present heirs" of Nancy West. As the deed could not have operated to convey to the heirs of Nancy West, the clause must be construed to convey to persons in being jointly with her, or else it must be disregarded. We can not disregard the clause, emphasized as it is by clear and deliberate repetition, and we must ascribe to it the force which the law assigns it. Words deliberately put into a deed, and put there for a purpose, are not to be lightly considered, nor arbitrarily put aside. The words in the deed before us were deliberately written in the instrument, are there for a purpose, and are not without meaning. We can assign them a meaning without encroaching upon any rule of law, and, by doing this, can give just effect to the intention of the grantor. Our reason for asserting that we can give them a meaning and thus effectuate the intention of the grantor is this: The real consideration of the deed is the love and

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affection which the grantor bore to Nancy West and her "present heirs," and it was these persons jointly, and not Nancy West alone, that he intended to make the recipients of his bounty. Our reason for asserting that we can assign a meaning to the words that will carry the estate where the grantor meant it to go, without violating any rule of law, is this: That such words are descriptive of a class who shall take the estate, and are not words carrying an estate to the first named person in severalty and to her successors in perpetuity, and, consequently, they operate to convey a joint estate to persons in being. The class, of which the words used in this deed are descriptive, is composed of Nancy West and her "present heirs" jointly, and as she can have no heirs while living, they mean heirs presumptive. *Broom Legal Max.* 521.

The case, although a rare one, is not novel, nor are the principles which govern it new to the law. Words of limitation are words used as descriptive of persons who are to take as the successors of the first person named, and the word "heirs" is usually such a word. The word is, however, not always assigned that force. Preston says it can not have that force if the "intention steers clear of the reason of the rule, or of its literal terms." *Preston Estates*, 275. The intention in this instance does "steer clear," for, as it is perfectly obvious that Nancy West could not have "present heirs," the reason of the rule is avoided, and the words "present heirs" can only be regarded as descriptive of a class who are to jointly take the estate with the grantee expressly named. Recurring to Preston, we find it written by him, that, "After the intention is fixed, the law decides on the gift; allowing the intention to govern, as often as it is clear that the word heirs is not used, as descriptive of the class of legal successors; but in designation of an individual, or of particular persons." *Preston Estates*, 275.

In *Fearne on Remainders* it is said, in speaking of the rule in *Shelley's Case*, that "The rule will not be applied if there

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are any words mediately or indirectly, yet unequivocally, denoting, that the persons who are to succeed are individuals other than persons who are to take simply as heirs general or special of the ancestor." 2 Fearn's Remainders, p. 239. At another place this author says: "But, if there are any words referring, not merely to the mode of succession, but to the objects of succession, and clearly and unequivocally explaining or indicating them to be individuals other than persons who are to take simply as heirs general or special of the ancestor; the rule will not apply." 2 Fearn, *supra*, 238.

Chancellor Kent says: "Where the testator annexes words of explanation to the word heirs, as to the heirs of A. now living, showing thereby that he meant by the word heirs a mere *descriptio personarum*, or specific designation of certain individuals," the case is not within the rule in Shelley's Case, 4 Kent Com. 221.

In *Darbison v. Beaumont*, 1 P. Williams, 229, the provision reads thus: To "the first son of his (the testator's) body lawfully begotten, and the heirs male of such first son lawfully issuing," and it was held that this was a description of the person who was to take.

The devise in *Burchett v. Durdant*, 2 Ventr. 311, was: "I give to my cousin John Higden and his heirs, during the life only of Robert Durdant my kinsman, all those my messuages, etc., in Chobham in the county of Surrey; upon this trust and confidence, that he the said John Higden and his heirs, shall permit and suffer the said Robert Durdant, during his life, to have and receive the rents and profits thereof, which shall yearly grow due and payable. * * And from and after the decease of Robert Durdant, then do I give the said lands and premises in Chobham unto the heirs males of the body of him the said Robert Durdant now living, and to such other heirs male and female as he shall hereafter happen to have of his body; and for want of such heirs, then to the use and behoof of my cousin Gideon Durdant and the heirs of his body."

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The holding of the court, as the reporter gives it, was: "That this was a remainder vested in George Durdant: for the remainder being limited to the heirs of the body of Robert Durdant, now living, and George being found to be then the only son, it was a sufficient designation of the person, and as much as if it had been said, to his heir apparent," and that "George Durdant took an estate tail."

The reasoning of the court was, that as the person named could not have heirs in his lifetime, the testator must be taken to have employed the words found in the devise as descriptive of the person who should take a present estate, and not as designating the successors of the first taker.

In *Vannorsdall v. Van Deventer*, 51 Barb. 137, the language of the will was: "*Fourth.* I give and bequeath to the legal heirs of my brother, Abram Vannorsdall, deceased, *Fifth.* And the legal heirs of my sister, Maria Snyder, deceased, *Sixth.* I give and bequeath to the heirs of my brother-in-law, William Van Deventer, all my real estate at the death of my wife, Elizabeth, to be divided equally between each of the heirs above named after the decease of my wife, Elizabeth Vannorsdall," and the court held that the word "heirs" should be held to mean children of the persons named.

In *Simms v. Garrot*, 1 Dev. & B. Eq. 393, it was decided that "A legacy to the lawful heirs of A., when it appears in the will that he is living, is equivalent, as a description, to a legacy to his next of kin, or to his children."

In *Goodright v. White*, 2 W. Blackst. 1010, the devise was to Margaret White and her heirs, now living, and it was held that the case was not within the rule. There are other cases declaring a like doctrine, but we deem it unnecessary to comment upon them. *Heard v. Horton*, 1 Denio, 165; *James v. Richardson*, 1 Ventr. 334; *Roberts v. Ogbourne*, 37 Ala. 174; *Powell v. Glenn*, 21 Ala. 458.

In *Shimer v. Mann*, *supra*, we examined this general subject and marked the distinction between cases where the words "heir" and "heirs" were employed as words of limita-

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tion, and those where, by the force of superadded words, these words were deemed to be descriptive of a class who should take, and held that in the one case they denoted successorship under the laws of descent, and in the other denoted individuals who should take the estate granted, and that as used in the instrument then before us they denoted successorship. We now encounter a case where they do not denote successorship, but describe a class who shall take the estate.

It has been very often held—there is, indeed, no conflict upon the question—that the technical words may be explained by superadded words, and that where it clearly and unequivocally appears that the word “heirs” was not used in its technical sense, it will be assigned the meaning given it by the person by whom it was used. *Shimer v. Mann*, *supra*, *vide* auct. p. 193; *Ridgeway v. Lanphear*, *supra*; *Rapp v. Matthias*, 35 Ind. 332; *Cleveland v. Spilman*, 25 Ind. 95.

We know that wills are construed with more liberality than deeds, and that courts are less inclined to depart from the technical meaning of the word “heirs” in the one case than in the other. *Shimer v. Mann*, *supra*; *Ridgeway v. Lanphear*, *supra*; *Cleveland v. Spilman*, *supra*. But, in the case before us, the meaning of the instrument is too plain to admit of doubt. It is certain that the often repeated words “present heirs” have some meaning, and it is equally clear that they can only mean heirs apparent, who in this instance were the children of the person named.

In *Darbison v. Beaumont*, *supra*, it was said: “That the word ‘heir’ had in law several significations: in the strictest, it signified one who had succeeded to a dead ancestor; but in a more general sense, it signified an heir apparent, which supposed the ancestor to be living,” and it was there held, as we hold here, that the word was used in the latter sense. The court in *Blake v. Stone*, 27 Vt. 475, ap-

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plied this principle to a deed wherein the *habendum* was as follows: "To have and to hold the same to the said Leonard Burt for and during the term of his, the said Leonard Burt's natural life, and no longer, and in remainder to the heirs of his, the said Leonard Burt's, body (Charles Burt, son of the said Leonard, excepted,) forever." In *Prior v. Quackenbush*, 29 Ind. 475, the question arose upon a deed, and it was held that the superadded words controlled the technical terms and created a life-estate. It is not possible that a deed containing the usual word "heirs" should in all cases be held to carry a fee, for there may be other words which will give force and effect to the deed and which will control the word "heirs," for no one would seriously insist that, if the word "apparent" was prefixed, the technical meaning would not be changed. The rule is that it is only where the word is used in its technical sense that it necessarily operates to convey a fee. An eminent lawyer says: "The words 'heirs,' or 'heirs of the body,' must be used in their technical sense, as importing a class of persons to take indefinitely in succession. Hence, if it appears that the words were not employed in this sense, but inaccurately, as designating particular individuals only, as if the limitation were to the heirs now living, the rule in *Shelley's* case would not be applicable; but the persons who, at the time of the limitation, were the ancestor's heirs apparent, or presumptive, would take a vested remainder." 2 Minor Inst. 343. This principle applies here. It is evident that the grantor did not use the word "heirs" in its technical sense, for it is inconceivable that he should bear natural love and affection to those who should succeed in an indefinite line the daughter whom he named. The words "present heirs" are quite as expressive and clear as the words "heirs now living," and it is obvious that the grantor meant to grant the estate to living persons for whom he cherished "natural love and affection."

There are cases where words annexed to the word "heirs" may be rejected as repugnant, but this is not such a case.

Here the words employed by the grantor describe the persons who shall take, and do not undertake to limit or define the mode of succession. Words superadded to the word "heirs" may be rejected when they undertake to limit the mode of succession and to override the rules of law, but not when they are employed for the purpose of designating the persons who shall take the estate. If we should assume that the word "heirs" is used in its technical sense, then there would be ground for holding that there was a repugnancy, but this we can not assume, for the superadded words show that it was not thus used, but was used in the sense of heirs apparent or presumptive. Counsel quote from Preston what we regard as the true rule upon the question under immediate discussion. That author says: "It is also a rule, that the limitation must not prescribe an order of succession from the purchaser, differing from the order of succession which the law has established." Preston Estates, 461. But this rule does not govern here, for there is here no attempt to establish an order of succession; there is a description of the grantees who shall take the estate granted, namely, "Nancy West and her present heirs," and not a designation of those who shall succeed. The language employed by the grantor does not prescribe a mode of succession, but describes the persons who shall take the estate granted. Nancy West and her heirs apparent are indicated as the grantees; they are not described as the successors of a first taker. There is no attempt to fix or control the manner of succession; the grantor simply indicates that he entertains natural love and affection for his daughter and her present heirs, and to manifest that affection, grants to them the land conveyed.

It was the inexorable rule of the common law that unless the word "heirs" was employed in a deed, and employed in its technical sense, an estate in fee was not created, and as the word is not so employed in the deed before us, it did not, under the common law rule, convey the fee. It is argued by appellant's counsel that the grantor intended to convey the fee,

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and, therefore, that the instrument should be construed to create an estate in fee in Nancy West. But the answer to this argument is that the deed was executed in 1851, and is governed by the common law rule, for the statute changing the rule was not enacted until May 6th, 1852. *Nicholson v. Caress*, 45 Ind. 479; *Nicholson v. Caress*, 59 Ind. 39.

It is also argued that the word "present" should not be allowed to control the word "heirs," but this argument can not prevail, for the word is used deliberately, is several times repeated, and does essentially modify and qualify the meaning of the word which it precedes. The signification which the qualifying word annexes to the word "heirs", is not an unknown or strange one, but is one recognized by general use and by the law. Broom Leg. Max. 521. The modification is so essential as to strip the word "heirs" of its technical meaning and give it the general meaning of heirs apparent. It is impossible to escape this conclusion without holding that in no case can the meaning of the term "heirs" be modified, and this, as the authorities cited very satisfactorily prove, would be unreasonable and unjust. It needs no argument to prove that it is just to permit a grantor to select and designate the objects of his bounty, and that it is reasonable to permit him to affix his own definition to the words which he employs. If Isaiah Ferguson had used the words "the apparent heirs," or the words "the presumptive heirs," of Nancy West, we suppose nobody would dream of doubting that the word "heirs" was not used in its technical sense, and the word "present" so clearly shows that he meant heirs presumptive that we perceive no ground upon which it can be even plausibly maintained that the word "heirs" was used in its technical sense.

Another view of the case is presented by counsel, for they maintain that the words employed in the deed create an estate tail. We think this position is fully answered by Blackstone's statement of the rule: "As the word heirs," he says, "is necessary to create a fee, so in farther limitation of the

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strictness of the feudal donation, the word body, or some other words of procreation, are necessary to make it a fee tail, and ascertain to what heirs in particular the fee is limited. If, therefore, either the words of inheritance, or words of procreation be omitted, albeit the others are inserted in the grant, this will not make an estate tail. As, if the grant be to a man and his issue of his body, to a man and his seed, to a man and his children, or offspring: all these are only estates for life, there wanting the words of inheritance, his heirs. So, on the other hand, a gift to a man, and his heirs male or female, is an estate in fee simple, and not in fee tail: for there are no words to ascertain the body out of which they shall issue. Indeed, in last wills and testaments, wherein greater indulgence is allowed, an estate tail may be created by a devise to a man and his seed, or to a man and his heirs male; or by other irregular modes of expression." 2 Blackst. Com. 114. In the deed before us the limitation is not to the heirs of the body of Nancy West, but the grant is to her and her heirs apparent, whether they are or are not the issue of her body. There are, therefore, no words of procreation.

The question presented on the motion to modify the judgment is this: Did Nancy West take a life-estate in one-half of the lands, or did she take in common with her presumptive heirs, her children? We think that Nancy West and her heirs apparent took the estate in common, and that the judgment of the court below so adjudging was right. The rule is that where a thing is granted to several persons, and their respective interests are not specifically designated, they take jointly. *Wilburn v. Wilburn*, 83 Ind. 55; *Crockett v. Crockett*, 22 Eng. Ch. Rep. 553; *Allen v. Hoyt*, 5 Met. 324.

Judgment affirmed.

Filed May 25, 1885.

 Bennett, Administratrix, v. Bennett.

No. 12,161.

BENNETT, ADMINISTRATRIX, v. BENNETT.

102	86
137	535
102	86
147	614

APPEAL.—Decedents' Estates.—Mandate.—An application by an administratrix to sell real estate was resisted by a surviving partner of the intestate, upon the ground that the property belonged to the partnership, and its proceeds were necessary to pay debts of the firm, whereupon, by agreement, the sale was decreed and an order entered that so much of the purchase-money as was necessary to discharge the firm liabilities should be paid by the administratrix to the surviving partner. Upon refusal of the administratrix to so pay, the surviving partner instituted, in the same court, a proceeding in form for mandamus to compel payment. The proceedings were treated as in mandamus and ended in a final order compelling the payment.

Held, that, notwithstanding the novel form of the proceeding, its substance invoked only the probate jurisdiction of the court in the matter of the estate, and an appeal from the final order not taken within the time required by sections 2454-2457, R. S. 1881, should be dismissed.

From the Pulaski Circuit Court.

J. C. Nye and H. Burns, for appellant.

N. L. Agnew and B. Borders, for appellee.

ZOLLARS, J.—The appeal, on motion of appellee, was dismissed, because the "decision" or judgment in the case was regarded as one having "grown out of a matter connected with a decedent's estate," as provided in R. S. 1881, sections 2454 to 2457, both inclusive. Upon the motion to reinstate the case, appellant's counsel contend, very earnestly, that the case does not come within these sections, and that hence appellant had a year within which to appeal, as in ordinary cases under the code.

Appellee commenced this proceeding below by filing what is styled a complaint for a writ of mandate against appellant, as the administratrix of the estate of Nelson B. Bennett, deceased. The substance of the so called complaint is that appellant, as such administratrix, previous to the filing of the complaint herein, had filed her petition to sell the undivided one-half of a certain lot, and to that proceeding made

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appellee a party. He appeared and resisted the making of an order of sale, on the ground that he and decedent had been partners; that the lot was partnership property, and that it, or the amount for which it might sell, would be necessary to pay the partnership debts. By agreement of the parties, however, appellant was ordered by the court to sell the undivided one-half of the lot, and out of the first money that might be realized from such sale, pay over to appellee "the sum of \$250, or a sufficient amount to pay the debts of the firm." Under this order, appellant sold the real estate, and at the time this proceeding was instituted had the money derived from the sale. It is further averred in the so called complaint herein, that appellant refused to pay over to appellee any portion of the money, on the ground that he, as the surviving member of the firm of Bennett & Brother, had in his possession sufficient assets of the firm to pay all of the firm debts, and that hence the amount derived from the sale of the undivided one-half of the lot belonged to the estate of the deceased partner, of which estate appellant was the administratrix. There are the further averments, that \$352.50 of the amount for which the real estate sold, and which was in the hands of appellant, is required to pay the debts of said firm. The prayer of the complaint is that a writ of mandate issue against appellant to compel her to pay over to appellee \$352.50.

Upon this complaint, a writ was issued, and upon its return, and the appearance of appellant, she demurred to the complaint. This demurrer was overruled and she excepted. After joinder of issues, the case was tried, and the court made an order that appellant, as such administratrix, should, within ten days, pay over to appellee, as the surviving member of said firm, the sum of \$300. From this order and judgment appellant appealed, but did not file the transcript here within twenty days subsequent to the judgment, as required by the above sections of the statute, but did file it within the year as provided in the code.

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If the case comes within the above sections of the statute, the appeal was properly dismissed, otherwise not. This is the question for decision, raised by the motion to reinstate. That the decision below grew out of a matter connected with a decedent's estate must be clear. The lot, the undivided one-half of which appellant, as administratrix, was seeking to sell, and did sell, was partnership property, and subject to the payment of the partnership debts. The decedent owned the undivided one-half of the lot subject to those debts. If there were no firm debts, or if appellee, as the surviving member, had in his possession firm assets sufficient to pay all of the debts of the firm, the undivided one-half of the lot belonged to the decedent or to his estate. In making the order of sale, it seems to have been adjudicated upon the agreement of the parties that at least \$250 of the money that might be realized from the sale of the one-half was needed for the payment of the partnership debts. Whether or not more would be needed, was left an unsettled question. Whether much or little, all that might not be thus needed belonged to the estate represented by appellant. Whatever might be needed or might be ordered paid reduced the estate so much, and the estate could not be finally settled until appellee's claim should be in some way finally disposed of. The court's order, therefore, directing appellant to pay over to appellee \$300, was very clearly a decision growing out of a matter connected with a decedent's estate. It was, too, an order in support of the previous order made in the proceeding directly looking to the closing up of the estate. As we have seen, as a part of the judgment ordering the sale there was the further order that out of the money that might be derived therefrom, appellant should pay over to appellee \$250, and as much more as might be necessary to meet the partnership liabilities. This order the court had authority to enforce at any time by a subsequent order. The fund derived from the sale was in the hands of the administratrix, and thus in the custody of the court and subject to the orders of the court,

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as the administratrix was also subject to the orders of the court. If any part of the fund did not belong to the estate but in any sense to appellee as such surviving partner, the court had authority, on proper application, to order that amount to be paid over to him, and this authority the court clearly had, sitting as a probate court exercising probate jurisdiction. The \$250 and indeed as much more as might be necessary to pay the partnership debts had, by the agreement of the parties, been ordered to be paid over. Nothing remained to be done except to pay over that amount, and to determine and pay over an additional amount if necessary, unless for sufficient cause the court might by a subsequent order otherwise direct. Whatever order the court might make in the premises would necessarily be by the exercise of its probate jurisdiction in dealing with the fund, the estate, and the administratrix, and hence the application for such an order should be so addressed to the court as to invoke the exercise of its probate jurisdiction.

Appellant's counsel are clearly right in their contention that the remedy by mandamus is in no sense the proper remedy to accomplish the end sought by appellee in the case before us. But here counsel carry the argument too far, by contending that because what should have been treated as an application to the court, was styled a complaint for mandamus, and because the court below seems to have so treated it, therefore appellant had a year in which to appeal.

That the court below may have treated the proceeding as one by mandamus does not alter the fact that the decision made in the case was one growing out of a matter connected with a decedent's estate.

If the form of the proceeding adopted below were one specially provided by the civil code in such cases, then the case of *Rusk v. Gray*, 74 Ind. 231, and cases like it, cited by counsel, would be authority. But to argue that mandamus is in no sense the proper remedy in a case of this character is to argue the case in hearing out from under the rule

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laid down in those cases. And to argue that because appellee misnamed the proceeding instituted by him, and the court acted upon that misnomer, appellant had a year within which to appeal, is to substitute form for substance. If the so-called complaint states sufficient facts to authorize the action of the court, and these facts were established by the evidence, it is of but little consequence what the proceeding may have been called. The court below must have regarded the facts averred and proved to be sufficient to authorize the order made, and hence made it. This order is the decision by which appellant felt herself aggrieved, and from which she appealed. And this decision is clearly a decision growing out of a matter connected with the decedent's estate, and a decision, an appeal from which should have been perfected within the time limited by the above sections in the decedents' act. It is, perhaps, not necessary that any further opinion should be expressed, but we observe in passing that the complaint is such as to subserve the purposes of an application, and states facts sufficient to authorize the action and order of the court below.

Upon a re-examination of the questions involved we are constrained to hold that the appeal was not taken in time, that it was properly dismissed, and that the motion to reinstate should be overruled. The motion is, therefore, overruled.

Filed May 25, 1885.

No. 10,875.

PARMATER v. THE STATE, EX REL. DRAKE.

COUNTY COMMISSIONER.—*Term of Office of Successor Filling Vacancy.*—Where a person who has been elected to and has entered upon a full three-years' term of the office of county commissioner resigns said office, his appointed successor will hold, by virtue of his appointment, for such portion of the remainder of such full term as may elapse before the next general election, and a person elected at such next general election as successor in such vacancy, said full term not then having ex-

102	90
124	558
102	90
129	4
129	338
102	90
138	198
102	90
141	381
142	222
102	90
144	237
144	607
145	350
102	90
151	282
102	90
160	219
102	90
168	515

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pired, will hold, by virtue of his election, not for three years from his said election, but for the unexpired portion of such resigned officer's full term.

SAME.—Election.—Defective Notice.—Where at a general election a vacancy in the office of county commissioner is to be filled, and there is not also to be an election of a successor for a full term, the fact that the election notice does not show that an unexpired term of such office is to be filled at the election, will not affect the elected commissioner's tenure of office.

SAME.—Certificate of Election.—Collateral Attack.—In a proceeding by information to oust an incumbent of an office holding over after the expiration of his term, in favor of another holding a certificate of election as successor of the former, the defendant can not attack such certificate by showing that said holder was not elected to such office, and that a third person was elected.

SPECIAL VERDICT.—Facts not Found.—Facts not found in a special verdict are to be regarded as not proved by the party having the burden of proof.

From the Kosciusko Circuit Court.

*R. M. Johnson, L. M. Ninde and E. G. Herr, for appellant.
J. H. Baker and J. A. S. Mitchell, for appellee.*

FRANKLIN, C.—This is a proceeding in the nature of *quo warranto*, in the name of the State, on relation of the prosecuting attorney, denying the right of the defendant Parmater to hold the office of commissioner of the first district of Elkhart county, and alleging that one John A. Smith was entitled to that office. A demurrer was filed to the information and afterwards withdrawn.

The defendant filed an answer in six paragraphs; and there was a reply in denial, when the venue was changed to Kosciusko county; trial by jury, and by request a special verdict was returned. Whereupon the defendant moved for a *venire de novo*, which was overruled, and the defendant moved for a new trial, which was also overruled. He then moved for judgment in his favor on the special findings, which was also overruled, and judgment was rendered thereon in favor of the plaintiff, and the defendant appealed to this court.

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The errors assigned are:

1st. The information does not state facts sufficient to constitute a cause of action.

2d. Overruling motion for a *venire de novo*.

3d. Overruling motion for judgment in favor of defendant on special verdict.

4th. Overruling motion for a new trial.

5th. Rendering judgment against appellant.

6th. Overruling motion to postpone trial.

The information substantially states that at the general election of 1878, one Mather was elected commissioner for the first district of Elkhart county, for the term of three years from and after the 20th day of October, 1879; that in due form he entered upon the duties of said office; that he resigned August 7th, 1880, and the defendant was duly appointed to fill the office until the next general election; that afterwards at the general election of 1880, "the defendant was duly elected to the office of county commissioner for said district number one, made vacant by the resignation of Jonathan S. Mather as aforesaid," and duly entered upon the duties of said office; that afterwards at the general election held on the 7th day of November, 1882, in said county, John A. Smith, a person legally qualified to fill said office, was duly elected to the office of county commissioner for the first district of Elkhart county, as the successor of the defendant, and received his certificate of election in due form, and took the oath of office prescribed by law; that at the December term, 1882, of the board of commissioners of said county, the said John A. Smith took his seat with the other commissioners of said county and undertook to enter upon the discharge of the duties of his office, but the defendant, pretending that said office belonged to him, and claiming that his term of office had not expired, refused to surrender to said Smith said office, intruded into and unlawfully holds and attempts to exercise the duties of said office, to the exclusion of the said John A. Smith. Wherefore, etc.

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The objection urged against this information is that the facts stated show that the defendant had the right to hold the office, and that Smith had no right to the office at that time.

The controversy between the parties appears to be, whether, where a commissioner has been elected for a full term and has entered upon his term and resigned at the end of nine months, and a successor has been appointed, who held until the next general election, which occurred at a time when two years of the resigning commissioner's term remain unexpired, the commissioner elected will hold for a full term of three years, or whether he holds simply to the end of the unexpired term of such resigning commissioner.

The notice for the election in 1880 said nothing about whether the commissioner was to be elected for a full term or the balance of an unexpired term. A similar notice was given for the election of 1882.

The 5733d section, R. S. 1881, which is the same as sec. 3, 1 R. S. 1876, p. 350, provides: "At the first election held to choose the first board of commissioners of any county, the person having the highest number of votes shall continue in office three years; the next highest, two years; and the next highest thereafter, one year; but if two or more persons have the same number of votes, their term shall be determined by lot, under the direction of the board of canvassers returning the election; and, annually, thereafter, one commissioner shall be elected, and shall continue in office three years, and until his successor is elected and qualified." The regular term of office of a commissioner is thus fixed at three years, and one is required to be elected each year. At the time this statute was first adopted we had annual elections; they are now changed to biennial elections, but the same language is still retained in the statute. And the only way that the spirit of the statute can now be carried out, is for the term of office of one of the commissioners to commence each year, so that there may at all times be at least two commissioners on the board of some experience. And in order to preserve

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this regulation the terms of office of each must commence and end regularly at periods of three years.

The record in this case shows that the county of Elkhart was divided into commissioner districts in 1831. And it is insisted by appellee that the term of office in the first district thereof has been regularly kept up in terms of three years ever since, vacancies being filled by appointments until the next general election, and after that by election until the expiration of the term. While it is contended by appellant that there have been irregularities in keeping up the regular terms.

We do not think it advisable or necessary to investigate all the terms of the various commissioners in this district since the organization of the county. If there were irregularities in the terms of the office ten, fifteen or thirty years ago, they can not be regulated in the matter in dispute between these parties.

The information expressly charges that at the fall election of 1878, Jonathan S. Mather was elected commissioner of said district for the term of three years from and after the 20th day of October, 1879; that he served nine months of the time and resigned; that appellant was appointed to fill the vacancy until the next general election; that at the general election, in 1880, he was elected commissioner for said district, the office of which was made vacant by the resignation of said Jonathan S. Mather. Under these charges and the law applicable to them, did appellant's term of office close after the general election of 1882, and the qualification of his successor, or did it extend for three years from the date of his election?

The 5567th section, R. S. 1881, which is the same as sec. 7, 1 R. S. 1876, p. 922, and has been the statute ever since March 13th, 1852, reads as follows: "Every person elected to fill any office in which a vacancy has occurred shall hold such office for the unexpired term thereof."

Appellant contends that this section does not apply to the office of county commissioner, because, as he claims, a va-

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cancy in such office is to be filled by appointment; that the vacancy being thus filled by appointment, there can be no commissioner elected to fill an unexpired term at the next general election, and hence the commissioner elected at the next general election is elected for the full term of three years, and not to fill out the unexpired term.

Section 5733 provides that the term of office of a county commissioner shall be "three years, and until his successor is elected and qualified." Section 5731 provides that "Whenever a vacancy occurs in the office of commissioner before the expiration of the term, the remaining commissioner or commissioners, together with the auditor, shall choose some person to fill such vacancy until the next annual election." The obvious meaning of the statute is that where there is a vacancy in the term, such vacancy is to be filled by appointment until the next general election, when some one is to be elected to fill the vacancy until the end of the term. The vacancy created is one for the whole of the unexpired term which the resigning officer was entitled to hold. The appointment is not intended, and does not profess, to cover the whole vacancy; it is expressly limited to until the next general election. If there is any residue of the term remaining after the next general election, that is to be filled by an election. Section 5567 being upon the same subject, and not in conflict with the foregoing provisions in relation to county commissioners, must be considered in connection therewith; and it expressly provides that "Every person elected to fill any office in which a vacancy has occurred shall hold such office for the unexpired term thereof." Appellant certainly was elected to fill an office in which a vacancy had occurred by the resignation of Mather. The statute says that he, in such cases, shall hold such office for the unexpired term of Mather. The word "term" applies to the office, and not to the person holding it. *State, ex rel., v. Mayor, etc.*, 28 Ind. 248; *Baker v. Kirk*, 33 Ind. 517; *Sackett v. State, ex rel.*, 74 Ind. 486.

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It is further insisted by appellant that the 5567th section does not apply to legislative offices. In this we think appellant is mistaken. It can only apply to legislative offices, and not to offices where the Constitution has fixed the terms of office. *Governor v. Nelson*, 6 Ind. 496; *Coffin v. State, ex rel.*, 7 Ind. 157; *Baker v. Kirk, supra*; *Mayor, etc., v. Weems*, 5 Ind. 547; *State, ex rel., v. Mayor, supra*. We think the information stated facts sufficient to constitute a cause of action.

The third alleged error is in overruling appellant's motion for judgment on the special verdict. Three reasons are suggested:

1. The election of appellant was for a full term of three years, because section 5567 does not control and limit the three years' tenure provided for in section 5733.

We do not think it necessary to discuss this proposition further.

2. Even if the election of appellant should have been for the unexpired term of Mather, that is, for the term expiring October 20th, 1882, still as the election notice did not state that the appellant was to be voted for and elected for such unexpired term, he would, therefore, hold for a full term of three years.

The election notice, by failing to state that the unexpired term of Mather would be filled at said election, did not have any effect on appellant's tenure of office. The term for which appellant could hold the office was fixed by law.

The authorities cited by appellant in support of this proposition we do not think applicable to this case. If there had been, at the general election held in October, 1880, a vacancy to be filled, and also a full term of commissioner in district number one, then the terms of the notice might be controlling in showing that the person voted for was elected for the full term, which is supported by the authority relied on by appellant in *State, ex rel., v. Cogswell*, 8 Ohio St. 620. But in the case we are considering no such condition existed; only one commissioner was to be elected, and he could be

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elected only to fill the office for Mather's unexpired term. A commissioner, whose term should commence after the expiration of Mather's unexpired term, could not have been lawfully elected at the October election, 1880. Hence it follows, if appellant was lawfully elected for any term, it was for the unexpired term of said Mather. An omission or mistake in the notice of the election, can not control the tenure of office.

3. Appellant's counsel claim that the special verdict shows that Alonzo Gilbert was elected commissioner in said district number one, at the general election in 1850; that he received the highest number of votes of any candidate for commissioner in the county, and that he was entitled to hold for three years thereafter, and that the regular terms thereafter, of three years each, would make appellant's term expire at the general election in 1883, instead of 1882, as contended for by appellee. But the special verdict further shows that Gilbert was elected to fill a vacancy in the office of commissioner in said district, created by the resignation of Philo Morehouse, Jr., who only held nine or ten months of his term. The jury finds that on the 1st Monday in September, 1849, pursuant to an election duly had, Philo Morehouse, Jr., took his seat as commissioner for the term of three years from that time; that on the 24th day of July, 1850, he resigned said office, and that at the August election, 1850, said Alonzo Gilbert was elected to fill said vacancy, and held said office till the first Monday in September, 1852, when he was succeeded by Ira B. Woodworth. At the time of said Gilbert's said election the following statute, approved January 21st, 1850, was in force: "That the eleventh section of chapter four of the Revised Statutes of 1843, shall be so construed and is hereby declared to mean that any person who may be elected to the office of county commissioner to fill a vacancy in said office, may hold and continue in said office of county commissioner for the remainder of the term which his predecessor had to serve, and no longer." Acts 1850,

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p. 27. Appellant insists that this statute was unconstitutional and of no effect, for the reason that the Legislature could not exercise the constitutional power of the courts, by giving any particular construction to a statute; that it could pass statutes, but the courts alone could give them authoritative constructions. Whether this be true or not under the old Constitution, said Gilbert appeared to acquiesce in the validity of the statute and surrendered the office to Woodworth in the fall of 1852, instead of holding out a full term of three years and until the fall of 1853. Even if Gilbert had the legal right to hold the office another year, but chose not to do so, and the regular terms, of three years intervals, have been kept up ever since, we do not see upon what principle of the law appellant, thirty years afterwards, can appropriate to himself the year that Gilbert failed to hold the office, and thereby continue his term for another year. We see no error in overruling appellant's motion for judgment in his favor on the special findings.

Under the fourth specification of error, the overruling of the motion for a new trial, the appellant insists upon the sixth reason, which is for refusing to allow the appellant to prove by introducing the ballots in evidence that John A. Smith was not elected, and that one Walter S. Hazelton was elected, commissioner for said district number one. Appellant says: "We are aware that the authorities go to the point. Smith's office can not be attacked in this collateral manner." He says, however, "We care nothing for such authorities. Our statutes define what the issues shall be, and any authority outside of Indiana which declares that issue to be immaterial must step aside."

In the case of *De Armond v. State, ex rel.*, 40 Ind. 469, it was held that one who has received a certificate of election to the office of township trustee, and who has qualified by giving bond and taking the oath of office, is entitled to the office as against an incumbent whose term has expired, though some other person may be prosecuting a contest of the elec-

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tion, that the contest is a matter in which the incumbent has no interest, and it can not enable him to continue to hold the office.

This is a suit by the State to oust appellant from the office he is holding, and in which appellant can not collaterally attack the certificate of election of Smith. If it had been a case of contest of the election between Hazelton and Smith, there is no doubt but Hazelton would have had the right to go behind the certificate, for as to him Smith's certificate would only be *prima facie* evidence of Smith's election. But as between appellant and the State, the title to the office as between Hazelton and Smith, over the regular certificate of election, can not be inquired into. *Reynolds v. State, ex rel.*, 61 Ind. 392. What right has the appellant to hold the office after his term has expired, on the ground that Hazelton might, if he desired, successfully contest Smith's *prima facie* title, when the public and Hazelton acquiesced in the legality of Smith's election and the accuracy of the count of the board of canvassers?

In the case of *State, ex rel., v. Buckland*, 23 Kan. 259, it is said: "Buckland 'can not avoid the effect of the decision of the canvassers by simply holding on to the office, and claiming that the decision of the canvassers was erroneous, or that the electors who cast the votes were not legal electors, or that fraud was practiced which, when investigated, would show a different result. The law will not permit him, on the pretence of championing the losing party, to hold on to the office for his own benefit.'"

In McCrary's work on American Law of Elections, section 221, the following language is used: "There can be no doubt but that a certificate of election regular in form, and signed by the proper authority, constitutes *prima facie* evidence of title to the office, which can only be set aside by such proceedings for contesting the election as the law provides." See authorities therein cited, and also section 204, with authorities cited, to which we add the following authorities: *Commonwealth, ex rel., v. Baxter*, 35 Pa. St. 263; *Kerr v.*

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Trego, 47 Pa. St. 292; *State v. Governor*, 1 Dutcher (N. J.) 331; *People, ex rel., v. Miller*, 16 Mich. 56; *Crowell v. Lambert*, 10 Minn. 369; *State, ex rel., v. Sherwood*, 15 Minn. 221; *State, ex rel., v. Churchill*, 15 Minn. 455; *People, ex rel., v. Callaghan*, 83 Ill. 128.

In the case of *People v. Head*, 25 Ill. 287, the court says: "The decision of the canvassers afforded *prima facie* evidence that the relator was legally elected, and entitled him to the office till that canvass should be set aside by a proceeding to be instituted by the defeated candidate, in courts of justice and in the forms of law."

In the case of *Supervisors v. O'Malley*, 46 Wis. 35, 56, it is said: "The rule, as I understand it, is this: that, as against a person holding an office by virtue of an election for a term of office which has expired, the person so holding over is estopped from denying that his successor was duly elected, when such successor shows that he was declared elected by the proper board of canvassers. He can not avoid the effect of the decision of the canvassers by simply holding on to the office, and claiming that the decision of the canvassers was erroneous, or that the electors who cast the votes were not legal electors, or that fraud was practiced which when investigated would show a different result."

In the case of *People v. Cook*, 8 N. Y. 67, 82, the court states the rule to be: "The certificate" of the board of canvassers "may indeed be conclusive in a controversy arising collaterally, or between the party holding it and a stranger." To the same effect is the case of *Hadley v. Mayor, etc.*, 33 N. Y. 603.

Under the seventh reason for a new trial, it is further insisted by appellant that he had the right to offer the ballots voted at the election of Smith for the purpose of proving that they were illegal, and that Smith was not legally elected, but Hazelton was legally elected.

The foregoing, upon the sixth reason, dispenses with the ne-

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cessity of any discussion of the seventh, for we think there is no error in the court's refusing to permit appellant in this collateral proceeding to go behind the regular certificate of Smith's election.

The tenth reason for a new trial is also insisted upon, and that is, that the court erred in permitting appellee, by parol, to prove the contents of Smith's certificate of election, with his oath of office endorsed thereon. •

The special second bill of exceptions is silent as to what proof had been made to the court of the loss of the original. The presumption is in favor of the ruling of the court, and that sufficient reasons were shown to admit oral proof of the contents of the certificate. This bill can not be helped out by the long-hand report of the evidence, because it does not refer to such evidence, but only refers to the long-hand report not then filed, and if we are permitted to look at such long-hand report, which appears in the transcript, but not in any bill of exceptions, or signed by the judge or any other person, it will be seen that no objection was made to the proof of the contents of the certificate, or any grounds of objection pointed out. There is no error in the admission of this testimony.

We have discussed the main points insisted upon by appellant for a new trial, and regard the others as either immaterial or waived. We find no error in overruling the motion for a new trial.

As to the overruling of the motion for a *venire de novo*, we see no uncertainty, ambiguity or contradiction in the special verdict that would prevent the rendition of the proper judgment upon it. Facts not found in the special verdict are to be regarded as not proved by the party against whom rests the burden of proof. There is no error in overruling the motion for a *venire de novo*.

No exceptions appear to have been taken to the instructions, and no question is presented to this court in relation to

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them. We find no available error in this record. The case appears to have been fairly tried and a just result reached.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed April 23, 1884; petition for a rehearing overruled June 17, 1885.

No. 11,897.

STANLEY v. MONTGOMERY.

BOND.—*Liquidated Damages, Complaint for.*—*Evidence.*—In a suit on a bond which provides, that in case of breach “the penalty therein written shall be taken and deemed as liquidated damages,” it is not necessary to aver in the complaint, nor to prove on the trial, any amount of damages actually sustained, but on proof of the execution of the bond, and a breach of it, the plaintiff is entitled to recover the liquidated damages named in the bond.

SAME.—In a complaint on a bond conditioned for the payment of liquidated damages in case of breach, averments, that by the condition of the bond the penalty was to become due as liquidated damages, that the condition of the bond has been broken, “whereby an action hath accrued to the plaintiff against the defendant to recover the said sum of \$1,500, for which he demands judgment,” etc., are equivalent to an allegation that the penalty is due, or that the defendant is indebted in that amount.

INSTRUCTION.—*Credibility of Witness.*—*Province of Jury.*—An instruction, “that the jury must determine the credibility of the witnesses,” and that certain matters (enumerating them) “are proper matters for the jury to consider in coming to a conclusion as to whom they will believe and whom they will not believe,” does not invade the province of the jury, and is not erroneous.

SAME.—*Imposing upon Jury Inference Drawn by Court.*—In a suit on a bond given in compromise of a bastardy proceeding, conditioned among other things, “that the said S. should not by his misconduct give the plaintiff legal cause for divorce,” an instruction to the jury: “If you find that he (the defendant), after their said marriage, sought the society of prostitutes, and women of bad repute for chastity, or that he went into a private bed-room with a woman of bad repute for chastity, or a prostitute, in the night time, and remained there for some time, no

102	102
146	452

102	102
154	80

102	102
163	661

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one else being present, then, and in either event, your verdict should be for the plaintiff," is erroneous, because it imposes upon the jury an inference made by the court.

EVIDENCE.—*Husband and Wife.*—*Privileged Communications.*—A widow is not a competent witness to testify to communications made to her by her deceased husband during the marriage.

From the Madison Circuit Court.

C. L. Henry, H. C. Ryan and E. P. Schlater, for appellant.
M. S. Robinson and J. W. Lovett, for appellee.

BICKNELL, C. C.—The appellee brought this suit against the appellant. The complaint alleged that Emma Sutton had two suits pending against John Stanley, a son of the defendant, one for bastardy and the other for seduction, and that in the settlement of said suits they were dismissed, and the said John Stanley married said Emma, and before marriage, in consideration of said settlement, the defendant and said John Stanley executed and delivered to the plaintiff, as trustee for the use and benefit of said Emma, their joint and several bond, whereby they agreed to pay to the plaintiff the sum of fifteen hundred dollars. The conditions of said bond being that the said John Stanley should marry the said Emma Sutton and provide for her and the child begotten by him of her body; that he should furnish them with a suitable house, and should treat her as a husband should treat his wife, and that if said John should do and perform all his promises and agreements as written in said bond, then the same should be void, but if the said John should fail to do and perform the same, or if he should abandon the said Emma after their said marriage, or should fail to provide her with a house and suitable provisions, or should, by his misconduct, give to her a legal cause for divorce, then, and in either event, said bond should be in full force and effect, and the penalty therein written should be taken and deemed as liquidated damages for any breach of said bond, to be recovered in any proper action without relief from valuation or appraisal laws. That all the conditions of said agreement were performed by said

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Emma on her part, but said John failed to perform said conditions on his part, in this, to wit, that after said suits were dismissed, and after said marriage, he cursed, abused, and shamefully treated her; * * * that he falsely accused her of adultery; that immediately after said marriage he took his said wife to the house of her sister and there abandoned her; that he never provided for her a house, nor furnished her with any clothing or support for her or their said child, so that she has been compelled to live with her father; that during her confinement at her father's house, and afterwards, he wholly failed to provide her with medical aid, or to supply her wants, but remained absent from her; that during said marriage he left his said wife and sought the society of prostitutes, and was guilty of adultery with divers persons, whose names are unknown to the plaintiff; that afterwards said John Stanley died, and no administrator of his estate has been appointed; that by reason of the premises a right of action has accrued to the plaintiff against the said defendant, to recover on said bond for the use of the said Emma Stanley the sum of fifteen hundred dollars, for which, etc.

A demurrer to this complaint, for want of facts sufficient, was overruled.

The defendant answered by a general denial and by a special defence, which the plaintiff, in his reply, denied. The cause was tried by a jury, who returned a verdict for the plaintiff and assessed the damages at \$1,500, with a credit of \$50. The defendant's motion for a new trial was overruled, and judgment was rendered on the verdict. The defendant appealed.

The errors assigned are that the court erred in overruling the demurrer to the complaint, and that the court erred in overruling the motion for a new trial.

Two objections are made to the complaint, to wit:

1st. That the complaint does not allege any damages which have accrued by reason of the breach of the bond.

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2d. That the complaint contains no averment that the damages are due and unpaid.

In answer to the first objection, it is sufficient to say that where a complaint claims damages liquidated by agreement, it is not necessary to prove any amount of damages actually sustained, and the bond here sued on was clearly an agreement for liquidated damages.

In answer to the second objection to the complaint, it may be said that, although as a general rule matter of defence need not be anticipated in a complaint, yet an exception to this is that in suits on contracts for the payment of money it must be alleged that the demand is due and unpaid, or something equivalent thereto must be stated. In *Downey v. Whittenberger*, 60 Ind. 188, an averment that there is now due on said note \$737.88 was held sufficient. In *Deutsch v. Korsmeier*, 59 Ind. 373, an averment in the complaint that the defendant is indebted to the plaintiff was held sufficient, and in *Higert v. Trustees, etc.*, 53 Ind. 326, it was held that the averment that the defendant, although often requested, has hitherto wholly refused, and still refuses, to pay the same, or any part thereof, was held equivalent to an averment that the demand remained unpaid.

In the present case the complaint, after averring that by the condition of the bond \$1,500 was to become due as liquidated damages, and that the condition of the bond had been broken, continues thus, "whereby an action hath accrued to the plaintiff against the defendant to recover the said sum of \$1,500, for which he demands judgment," etc. We think that such an allegation in such a case is equivalent to an averment that \$1,500 is due, or that the defendant is indebted in that amount, and brings the case within the rulings in *Downey v. Whittenberger*, *supra*, and *Deutsch v. Korsmeier*, *supra*, and *Johnson v. Kilgore*, 39 Ind. 147. The objections made to the complaint can not be sustained.

The only reasons for a new trial discussed in the brief of

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the appellant are the sixth, seventh, eighth, ninth, tenth and eleventh.

The sixth reason for a new trial is that the court erred in refusing to give to the jury instructions requested by the defendant, numbered 1, 2, 3, 4, 5, 6 and 7.

Said instruction No. 1 declares that the plaintiff can not recover without proving some amount of damages actually sustained by her. This was correctly refused. The proper instruction on this point was given by the court of its own motion in instruction No. 8, to the effect that on proof of the execution of the bond and a breach of it, the plaintiff would be entitled to recover the liquidated damages named in the bond.

The appellant makes no argument in his brief as to the other instructions refused, and, therefore, the objections to them are regarded as waived.

The eighth reason for a new trial is that the court erred in giving to the jury instructions requested by the plaintiff, numbered 1, 2, 3, 4, 5, 6, 7, 8 and 9.

The ninth reason for a new trial is that the court erred in giving to the jury of its own motion instructions numbered 1, 2, 3, 4 and 5.

The appellant in his brief claims that the foregoing instructions "as a whole were very unfair to the defendant, and in many instances took from the jury the determination of all the questions of fact, and told them what they must conclude from a certain state of facts."

The appellant, however, points out no objection to any of these instructions specifically, except numbers 1 and 4 given by the court of its own motion, and numbers 2 and 6 given at the request of the plaintiff's counsel. Therefore, these objections only are here considered.

The objection to said instruction No. 1 is that it "narrows down the necessary proof to a single question," but this instruction merely declares that if any one of the condi-

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tions of the bond were broken, the plaintiff would be entitled to recover. There was no error in this.

The said instruction No. 4 stated that the jury must determine the credibility of the witnesses, and that certain matters (enumerating them) "are proper matters for the jury to consider in coming to a conclusion as to whom they will believe and whom they will not believe."

In *Woollen v. Whitacre*, 91 Ind. 502, it was held that the court may properly say to the jury that, on the question of credibility, certain things may be considered by them, but that the court must not, directly or indirectly, tell the jury that such things must, as a matter of law, be regarded in determining the question of credibility. We think that the instruction under consideration was in accordance with the rule as above stated in *Woollen v. Whitacre*, *supra*, and did not "invade the province of the jury."

The objection to said instruction No. 2 is the same as that above mentioned made to said instruction No. 1, and there was no error in it. It was not necessary that the plaintiff should prove a breach of every condition of the bond; it was enough to prove a breach of any of the conditions. The said instruction No. 6, one of the conditions of the bond being that the said John Stanley should not, by his misconduct, give the plaintiff a legal cause for divorce, was as follows: "If you find that he (the defendant), after their said marriage, sought the society of prostitutes and women of bad repute for chastity, or that he went into a private bed-room with a woman of bad repute for chastity, or a prostitute, in the night time, and remained there for some time, no one else being present, then, and in either event, your verdict should be for the plaintiff." This was clearly wrong. There was no breach of the condition now under consideration, unless the said John Stanley, by his misconduct, had given the plaintiff a legal cause for a divorce. In a suit for divorce it would be competent for the plaintiff to prove that the defendant sought the society of prostitutes, and the jury might

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make the proper inferences from such proof, but it would be error if the court should instruct the jury that they were bound on such proof to find a verdict for the plaintiff. That would be imposing upon the jury the inference made by the court, and it would deprive the jury of their right to make the necessary inferences from the facts proved. So, in such a case, it would be proper to prove that the defendant had occupied a room alone with a prostitute at night, and perhaps that proof would authorize the inference that adultery had been committed. But it would be the privilege of the jury to make the inference, and it would be error to instruct the jury that on such proof they were bound to find that adultery had been committed. In the present case, when the court charged the jury that their verdict should be for the plaintiff, if they should find that John Stanley had been seeking the society of prostitutes, or had been in a room at night alone with a prostitute, the court determined that such proof required the inference to be made that the plaintiff had a cause of divorce. The court thereby interfered with the province of the jury, which is to determine for themselves what are the proper inferences to be made from the evidence.

The only remaining causes for a new trial are the tenth and the eleventh. These question the right of the widow to testify as to what her husband said to her during their marriage. She was permitted so to testify by the court, for the reason that after John Stanley's death, she was no longer his wife. But when our Legislature departed from ancient usages and authorized the introduction of interested testimony, it preserved the old rule as to husband and wife, and forbade them to testify as to communications made to each other during marriage. This appears in the legislation of 1861, and in all the subsequent legislation on this subject. The present statute is, that husband and wife are not competent witnesses as to communications made to each other. R. S. 1881, section 497. The same reasons of public policy, which

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require that husband and wife shall be incompetent to testify as to communications made to each other, exist after the death of one of the parties as existed before such death, and accordingly it has been held by this court under the act of March 11th, 1867, that after the termination of the marriage, the former wife was incompetent to testify as to communications made to her by her former husband and during the marriage. *Mercer v. Patterson*, 41 Ind. 440; *Griffin v. Smith*, 45 Ind. 366; *Denbo v. Wright*, 53 Ind. 226. A like ruling was made under the act of March 15th, 1879. *Perry v. Randall*, 83 Ind. 143.

Following these rulings we hold that the widow, Emma Stanley, was not a competent witness to testify to communications made to her by her deceased husband during the marriage, and that the court erred in permitting her to testify as to such communications. For the errors hereinbefore pointed out the judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things reversed, at the costs of the appellee, and this cause is remanded, etc.

Filed April 25, 1885; petition for a rehearing overruled June 11, 1885.

No. 11,463.

BAKER v. CLEM.

DRAINAGE.—*Act of March 9th, 1875.*—*Lien of Certificate.*—*Pleading.*—*Complaint.*—In a suit to set aside and annul the lien of a certificate issued to a contractor, in a drainage proceeding commenced under the act of March 9th, 1875, and by the county treasurer placed on the tax duplicate for collection, on the ground that neither the plaintiff, nor the land upon which the lien was claimed, was mentioned in the viewers' report of benefits, a complaint, reciting such facts and showing that more than seven years have elapsed since the establishment of the ditch, but failing to allege that at the time of such establishment and report,

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the plaintiff was the owner of the land, and that the land was not intended to be assessed, is bad on demurrer.

SAME.—Erroneous Description of Land.—Under the act of 1875, above referred to, a misdescription in the viewers' report, or on the tax duplicates, of the land intended to be assessed, will not enable the owner to evade liability or defeat the lien thereon of the ditch certificate.

From the Allen Superior Court.

S. R. Alden, for appellant.

T. E. Ellison, for appellee.

Howe, J.—The first error of which complaint is made in argument by the appellant, Baker, calls in question the sufficiency of the complaint of the appellee, Clem, the plaintiff below, for the first time in this court.

In his complaint the appellee alleged that he was the owner of certain real estate, particularly described, in Allen county; that the treasurer of Allen county had levied on such real estate and threatened to sell the same, on account of a ditch certificate which, he claimed, was a lien thereon on account of a ditch petitioned for by S. F. Baker and twelve others to the board of commissioners of Allen county, at its September term, 1875; that Baker and others did file a petition at such term of the county board for a ditch, and the board appointed viewers thereon and ordered them to report at its next session; that the board did not hear and determine such matter at its next session; that, at the March term, 1876, of such board, the viewers in such matter presented their report therein, which report the board ordered to be entered on its record, and such report was accordingly copied in the record of the board; that such viewers in their report did not specify or state either the courses or termini of such ditch; that in their report the viewers said that they had therein estimated the costs, and appraised the benefits of such ditch to the several land-owners and tracts of land benefited thereby, and apportioned the same to the several tracts of land in such report; that nowhere in their report did the viewers apportion any benefit to the appellee or to his land, or assess any benefit

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against such land, or order any amount charged against the same, nor in any manner mention the appellee or his land; and the appellee averred that the board made no other order or determination of the matter, at such term, except as hereinbefore stated.

And the appellee averred that the only order or entry ever made by the board, establishing such ditch, was made at its June term, 1876, when, certain reviewers having reported as to damages asked for by one Timothy Baldwin, who did not object to such ditch for any reason except on account of the damage he would sustain from its construction, at the conclusion of the record of such report, the board made the following entry, to wit: "And the board, after careful examination of the matter, accept the report and establish the ditches, as located by the viewers and as specified by their report heretofore spread of record, and order the ditches to be opened;" that the report as to damages, prayed for by Baldwin, was, in substance, as follows: "We, the reviewers, appointed by the board at its March term, 1876, to review the proposed ditch prayed for by S. F. Baker, running through the fractional southeast quarter of section 35, in township 30 north, of range 15 east (Timothy Baldwin being the owner of the tract of land described), met at the office of Squire Neff and were sworn according to law, and proceeded to view the proposed ditch running through such land, and after having carefully examined the proposed ditch, running through such land, we report no damage to Timothy Baldwin, and we further say that the ditch has a good outlet," which report was sworn to before the auditor of Allen county, May 6th, 1876.

And the appellee further averred that, without any other authority than that given by the foregoing proceedings, the auditor of Allen county gave notice that he would make a contract to construct a portion of such ditch, on account of appellee's land, and the auditor did enter into a contract with one Warren Neff to do a portion of the work in constructing

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the ditch, and stated in the contract that Neff should hold a lien on such land ; that although Neff took a contract to do the work, he never completed it, and the auditor, without examining the work, executed to Neff a certificate that he had completed the work, that there was due thereon and on account thereof the sum of \$156.96, and that the same was a lien on appellee's land ; that Neff assigned or transferred such certificate to the appellant, Baker, and Neff or Baker had procured the treasurer of Allen county to place the amount of such certificate on the tax duplicate ; that the treasurer had demanded of the appellee that he pay the same, which, with costs and charges, amounted to the sum of \$207.04 ; that the same was a cloud upon appellee's title, and prevented him from selling his land to as good an advantage as he otherwise might ; that the current tax on his land amounted to \$3.76, which sum appellee had tendered to the county treasurer, and he refused to accept it ; and that the county treasurer had advertised that he would sell the appellee's land, as other lands were sold for delinquent taxes, to satisfy the amount due on such ditch certificate. Wherefore, etc.

The appellee's complaint was filed below on the 19th day of October, 1883, more than seven years after the county board had made an order establishing the ditch mentioned therein. It is not shown in the complaint when the appellee became the owner of the real estate upon which the treasurer of Allen county had levied, as alleged, by virtue of the ditch certificate. It might well be assumed, therefore, as against the appellee, that he became the owner of such real estate immediately before this suit was commenced, and long after the ditch was established and constructed, and it might be for this cause that nowhere in their report did the viewers apportion any benefit to the appellee or even mention his name. It is manifest that the ditch proceedings mentioned in the complaint were had, or attempted to be had, under and in conformity with the provisions of the act of March 9th, 1875. "to enable the owners of wet lands to drain and reclaim them

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when the same can not be done without affecting the lands of others," etc. 1 R. S. 1876, p. 428. In this act, after the ditch had been established by the board of commissioners of the county, it was provided in section 11 that the viewers or reviewers should proceed to make a just and fair estimate of the average cash value of the construction per lineal rod, cubic yard or foot of earth, and every section or allotment of such ditch, and apportion the costs of the location thereof, including, etc., and award to each person or persons owning lands liable to be affected by the proposed work, as should be deemed by them to be just and right according to the benefits derived by constructing the same, their proportionate share of such costs, and should specify the time and manner in which such labor should be performed, and should cause a stake or monument to be placed at the boundaries of each of the several portions, which should be numbered progressively down stream, at each one hundred feet.

In section 12 of such act, it was further provided that, if any of the persons interested in the opening or construction of the proposed ditch or work should fail to procure the excavation or construction thereof, or that portion set off and apportioned to them, respectively, by the viewers or reviewers, in the manner and time specified, it should be the duty of the auditor of the county to let such work at public sale to the lowest and best responsible bidder, and take a bond payable to the person or persons, for whom such work was let, with good and sufficient sureties for the faithful performance of the same within a specified time; and on completion of the work thus let, and acceptance by the board of commissioners, if in session, or by the auditor in vacation, the auditor should issue a certificate to the persons doing such work, for the sum due them, and should enter the amount of such certificate upon the tax duplicate against the tract or lot benefited by the opening or construction of that portion of such work, together with the legal interest, and the amount

so entered should be collected by the treasurer of such county as other taxes, and paid by him to the person holding such certificate. 1 R. S. 1876, p. 431.

Under these statutory provisions, we are of opinion that the appellee's complaint does not state facts sufficient to constitute a cause of action, or to entitle him to any relief, legal or equitable. Even if the appellee or his land were nowhere mentioned in the viewers' report, still it must be assumed, in the absence of averment to the contrary, that the ditch was established and constructed over and through his land; that the viewers awarded to the then owner of such land (perhaps, by an erroneous description,) his proportionate share of the costs of such ditch, and specified the time and manner in which such labor should be performed; and that they caused stakes or monuments to be placed at the boundaries of such ditch, at each one hundred feet, on and over such land. It is admitted in the complaint that, in substantial compliance with the provisions of section 12 of the aforesaid act of March 9th, 1875, the county auditor let the contract for the construction of the ditch over and through the appellee's land to Warren Neff, and that such auditor afterwards executed to Neff a certificate of his completion of the work for the amount due him, and placed such amount on the tax duplicate for collection as other taxes. It is stated in the complaint that Neff never completed the work, but it is nowhere stated that he had not performed work, in the construction of the ditch, to the full amount of the auditor's certificate. The appellee's land is clearly liable for its proportionate share of the construction of the ditch, on and through such land, and the misdescription of the land in the viewers' report, or on the tax duplicate, will not enable the owner to evade such liability, or defeat the lien thereon of the ditch certificate. This has been repeatedly declared by this court, in relation to the lien of other taxes on misdescribed lands. *Cooper v. Jackson*, 71 Ind. 244; *Reed v. Earhart*, 88 Ind. 159; *Cooper v. Jackson*, 99 Ind. 566. We

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know of no reason why this doctrine should not be applied to the case in hand.

The judgment is reversed with costs, and the cause is remanded for further proceedings in accordance with this opinion.

ZOLLARS, C. J., took no part in the decision of this cause.

Filed April 11, 1885; petition for a rehearing overruled June 11, 1885.

No. 11,690.

ANDERSON v. ETTER.

FRAUDULENT CONVEYANCE.—*Subsequent Purchaser.*—A conveyance of land executed for the purpose of defrauding creditors is binding against a subsequent grantee of the same grantor, unless such subsequent grantee establish some additional ground of relief. That the conveyance to defraud creditors was a violation of a criminal statute can not of itself serve as such additional fact.

SAME.—*Voluntary Conveyance to Defraud Creditors.*—A conveyance of land will not, in this State, be held void in favor of one who subsequently purchases for value, in good faith and without notice, from the same grantor, solely upon the ground that the prior grantee was a volunteer; but if such prior conveyance, besides being voluntary, was a part of a scheme to defraud creditors, of which the voluntary grantee had notice, his conveyance will be void as to such subsequent grantee.

From the Montgomery Circuit Court.

G. D. Hurley, B. Crane, P. S. Kennedy, S. C. Kennedy and J. F. Harney, for appellant.

T. E. Ballard and M. E. Clodfelter, for appellee.

MITCHELL, J.—Jacob R. Etter filed a bill in equity in the court below, praying that his title to certain real estate, therein described, be quieted, and that he might be relieved from a certain judgment taken against him in the Montgomery Circuit Court, which affected his right to the possession of the land in controversy, and asking further, that his right to re-

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deem under a sale made upon a decretal order, foreclosing certain mortgages, might be established upon equitable grounds.

The facts are comprehensively set out in a special finding of the court, and as the rights of the parties must depend upon a determination of the law upon the facts found, no further notice need be taken of the pleadings, which are so voluminous as to forbid any attempt at a statement of the issue.

From the finding of the court, it appears that on the 4th day of April, 1878, one Robert F. Hart was the owner of a tract of land in Montgomery county, and that prior to that time, he had executed two mortgages on the premises to secure two several debts, amounting to about \$700. Becoming financially embarrassed, he and his wife, on the date mentioned, conveyed the land to Louisa Stringer who, on the same day, conveyed it to Jacob R. Etter. Both the conveyance from Hart to Mrs. Stringer and that from Mrs. Stringer to Etter are found to have been made wholly without consideration, and with the purpose, on all hands, to defraud Hart's creditors, but without any *actual intent* to defraud Anderson or any other subsequent purchaser. On the 17th day of April, 1878, which was thirteen days after Mrs. Stringer conveyed to Etter, she sold and conveyed the land in dispute to Caleb H. R. Anderson, who paid therefor the sum of \$1,200 in cash, he taking his conveyance subject to the mortgages previously placed thereon by Hart. At the time Anderson purchased and paid for the land, he had no notice of the previous conveyance to Etter, nor of the fraudulent purpose of Hart, Stringer and Etter. The conveyance from Mrs. Stringer to Etter was not recorded at the time of Anderson's purchase, and Hart occupied the land under a lease from Mrs. Stringer. The fact of Hart's occupancy appears in the evidence and is undisputed. In the conveyance from Mrs. Stringer to Anderson the land was misdescribed so that the deed covered an entirely different tract from that intended. On the 22d day of April, 1878, Etter surrendered his deed to Hart, and the deed coming to the possession of Mrs.

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Stringer's husband was destroyed without his (Etter's) consent. Hart having meanwhile effected a compromise with his creditors, Mrs. Stringer, on the 23d day of April, 1878, voluntarily conveyed the land back to him and his wife by a correct description, she having in the meantime conveyed it to Etter and Anderson, respectively. Hart and wife subsequently, on May 13th of the same year, conveyed the land by quitclaim to Etter, which last conveyance was also voluntary.

In a few days after this Anderson commenced proceedings in the Montgomery Circuit Court for the purpose of correcting the description in his deed, and to quiet his title to the land, and to this suit Hart and wife, Stringer and wife, and Etter were all made parties. Such proceedings were had in that case that on the 29th day of May, 1879, a decree was given in favor of Anderson, reforming his deed and quieting his title. From this decree an appeal was taken by Etter to this court, which appeal resulted in a reversal of the decree of the Montgomery Circuit Court. *Etter v. Anderson*, 84 Ind. 333.

While the appeal was pending here Anderson sued Etter and Hart in ejectment, and on the strength of the decree above mentioned recovered a judgment, and by a writ issued thereon ousted Hart and Etter, and ever since has retained the possession of the land. From this judgment no appeal was ever taken, and it remains in full force.

Pending the appeal of the first case, the mortgages given by Hart were foreclosed, Etter having been made a party to the proceeding, and the lands were sold on the decree of foreclosure, Anderson becoming the purchaser at the sheriff's sale, for the amount of the mortgage debts and interest which he had previously purchased. Before the appeal was determined, the year for redemption expired, and Anderson received a sheriff's deed, so that by force of the erroneous judgment, which was afterwards reversed, he had obtained a judgment in ejectment and had prevented, as it is found, the redemption from the mortgage sale.

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Upon the facts found the court stated as a conclusion of law, that Etter was the owner and entitled to the possession of the land, and that he had an equitable right to redeem, notwithstanding the expiration of the statutory time, and a decree was rendered accordingly.

To reverse this decree the learned counsel for appellant rest their argument, substantially, on the following propositions:

1. Etter having received his deed in fraud of Hart's creditors, and in violation of section 2156, R. S. 1881, of the act defining crimes, it is contended that it is absolutely void for all purposes.

2. The conveyance to Etter having been made without any consideration, and to defraud Hart's creditors, it is insisted that it can not prevail as against the title of a subsequent *bona fide* purchaser for value without notice.

For the appellee it is contended that, conceding that the conveyances were fraudulent as to Hart's creditors, yet, inasmuch as Anderson was not a creditor of Hart, and because the conveyances were binding on the parties thereto, and all others except creditors, and Anderson's grantor having conveyed to Etter and parted with all the title she had in the land before she conveyed it to him, he, consequently, took nothing by his deed, and can make no question concerning the fraudulent purpose which was had at the time respecting Hart's creditors; that being a purchaser in good faith will not protect him, even as against a volunteer who has a legal title.

It is further contended on Etter's behalf, that the judgment in ejectment having been obtained, and the title in the foreclosure proceeding having accrued against him, while his hands were tied by means of the first judgment, which was afterwards reversed as erroneous, and the judgment in ejectment and sheriff's title being in a measure predicated thereon, he must be restored to the situation he was in before the erroneous judgment was obtained.

That an executed conveyance made for the purpose of de-

frauding creditors is binding as between the parties, can not be disputed, and that there is a statute making it a misdemeanor to make or receive a conveyance for such purpose, in no wise affects the question. It is equally binding, except as it may be controlled by other considerations, when fully executed, whether it is an infraction of a criminal statute or not.

Where, in pursuance of an unlawful scheme, in which persons have voluntarily engaged, property is conveyed, the law will not unravel the transaction after it has been carried into execution, for the purpose of enabling those involved to recover what may have been lost. The parties, and all others involved in the illegal scheme, will be left in the situation which they have chosen for themselves. This is the general rule. Whether to this, as to other general rules, there are exceptions, we need not now inquire.

As, therefore, a conveyance made to defraud creditors is binding on the parties to it when it is fully executed, it is likewise binding on a subsequent grantee of the fraudulent grantor, unless such subsequent grantee establish as the basis of his right to relief some other ground, in addition to the fact that it was made to defraud creditors; and that such conveyance is a violation of a criminal statute, is nowhere, so far as we know, of itself a ground which will serve as the basis upon which a subsequent purchaser may avoid a prior conveyance made for the purpose of defrauding creditors.

It was held in *Etter v. Anderson*, *supra*, as it had been in many previous cases, that a conveyance made and received for the purpose of defrauding creditors, is illegal as to creditors only, and it was there said, quoting from *Edwards v. Haterstick*, 53 Ind. 348, "As between the parties, and as to all others than creditors, it is legal and valid, and can be enforced in all of its terms as any other contract."

The result of the foregoing rule is that none but creditors can make the fact that the conveyance was made in fraud of their rights the basis of an action to set it aside on that account.

It does not follow from this, however, that one who is a purchaser in good faith may not, as against a mere volunteer, make the fact that he is a purchaser in good faith the basis of an attack, and supplement his attack from that point, with proof that in addition to being a volunteer the conveyance held by such volunteer originated in a fraudulent scheme.

Under the statute of 27 Elizabeth, the rule was settled, and still prevails in England, that all voluntary conveyances might be avoided by subsequent purchasers, who paid a valuable consideration, even though such purchaser had notice, and notwithstanding the voluntary conveyance was made without any fraudulent intent whatever.

The fact that the prior conveyance was voluntary under that statute as the law thereunder was administered, raised a conclusive presumption of fraud in favor of a subsequent purchaser, even with notice. The current of American decisions was, that if the subsequent purchaser had notice, and the prior voluntary conveyance was made without any fraudulent purpose, it would not be set aside.

Accordingly, it was held in *Stanley v. Brannon*, 6 Blackf. 193, following *Cathcart v. Robinson*, 5 Pet. 264, that a subsequent purchaser with notice, no fraudulent intent appearing, was not within the protection of the statute of 1838. This statute embodied some of the features of 13 and 27 Elizabeth.

The rule which seems to prevail generally is stated as follows: "A conveyance *actually fraudulent* is void against a subsequent purchaser for a valuable consideration, even with notice; and a voluntary conveyance is *presumptively fraudulent* against a subsequent *bona fide* purchaser *without* notice." *Gardner v. Cole*, 21 Iowa, 205; *Lerow v. Wilmarth*, 9 Allen, 382 (14 Am. Dec. 705 n.), and cases cited; *Hurley v. Oster*, 44 Iowa, 642; *Anderson v. Green*, 7 J. J. Marsh. 448; Wait Fraud. Conv., section 369, *et seq.*; May Fraud. Conv. 169; 2 Pomeroy Eq. Jur., section 794.

The rule above stated has been modified by construction in some of the States, and by statute in this State, to the extent

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that no conveyance or charge upon land shall be adjudged fraudulent, as against subsequent purchasers, "solely on the ground that it was not founded on a valuable consideration." R. S. 1881, section 4924; *Pence v. Crown*, 51 Ind. 336.

Sections 4915 and 4916, which embody the equitable rules of the common law on the subject, as well as the spirit of the statute of 27 Elizabeth, provide, in substance, that all conveyances of land shall be deemed void which are made with intent to defraud subsequent purchasers for a valuable consideration without actual or legal notice thereof, at the time of such purchase, and if it appear that the grantee in such conveyance, or the person benefited thereby was privy to the fraud intended, then it shall be void as to a subsequent purchaser for value with notice.

Construing these sections with section 4924, and the question then is, can a volunteer, who has taken a conveyance in a scheme to defraud creditors, be heard to say, as against a good faith purchaser without notice, that the fraud which was actually intended was aimed at creditors, and not at subsequent purchasers? In other words, can he, while admitting that he is both a volunteer and a fraudulent grantee, defeat the claim of the purchaser for value, by alleging and proving, or if it appears, that the particular fraud intended was not the one actually perpetrated?

The basis of Anderson's right in this controversy is that he is a purchaser in good faith for a valuable consideration without notice, and that Etter's (the prior grantee's) title is not founded on a valuable consideration. The statute above referred to provides that Etter's title shall not be adjudged fraudulent solely on that ground. But for this statute, under the rule prevailing, his title would fall upon the mere showing that Anderson bought and paid for the land without notice, and that he was a volunteer. When, in addition to that, it is conceded, or alleged and proved, that Etter's title originated in a scheme to defraud Hart's creditors, we think he should not be heard to say in a court of equity, while attempting to

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hold the fruits of that scheme, against an innocent purchaser, that it was not also a part of the scheme to perpetrate the identical fraud which was accomplished. While, under the statute, the conclusive presumption will not be indulged that the deed was fraudulent, from the mere fact that it was voluntary, yet when it is conceded that in addition to its being voluntary it was taken in a fraudulent scheme in which the holder was embarked, then a conclusive presumption arises that that scheme was to defraud the innocent purchaser. When the premise is conceded, that he is both a volunteer and a fraudulent grantee, the conclusion follows irresistibly, that the conveyance is void as to a subsequent good faith purchaser. After that admission he will be estopped in a court of conscience from saying that the result of his fraudulent scheme was not the result intended.

The case under consideration is, in our opinion, covered in principle in all its essential features by the case of *Paine v. Doe*, 7 Blackf. 485.

As it is expressly found that Anderson purchased without notice, we need not inquire what effect notice of the fraudulent purpose for which the deed was made would have had upon his rights, nor need we determine what effect the recording of Etter's deed would have had. It will be observed, in the case of *Paine v. Doe*, *supra*, that the voluntary deed was on record when the subsequent purchaser took title, and yet it was held that because the first deed was voluntary, and was made to evade the payment of debts, it was fraudulent as against a subsequent purchaser.

Our conclusion upon the facts as found by the court is that Etter was entitled to no relief whatever.

We have examined the points made on the cross errors assigned by the appellee, and without extending this opinion we think there was no error in the rulings of the court which are therein complained of.

All of the facts relating to the whole controversy are fully

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found by the court, and upon the facts found complete justice may be done to the parties.

The judgment of the court below is reversed, with costs, with directions to the court to state conclusions of law on the facts found in accordance with this opinion, and to render judgment accordingly.

Filed April 28, 1885.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—We have again given this case consideration, and find no reason to change our opinion. Much stress is laid upon the fact that there was no intention to defraud the appellant, but this fact is not the important one; for the strong and ruling fact remains, that the appellee was engaged in a fraudulent scheme to defraud the creditors of his grantor, and was a mere volunteer. The status he occupies entitles him to no consideration at the hands of a court of equity except as against his grantor and privies. Volunteers, even if free from fraud, can not invoke the assistance of a court to establish a right, although courts will sometimes interfere to preserve a *status quo* at their request. But here the volunteer was guilty of fraud, and relies upon the bare color of right given him by his fraud to defeat a *bona fide* purchaser for value. If such a volunteer can succeed in such a case, then a right of action can arise out of a fraud; but one of the oldest maxims of the law is that no right of action can arise out of a fraud. Surely no case could call more strongly for the application of this rule than the present.

Counsel say that the appellant is not a good faith purchaser, but an adventurer. The finding of the court is that he did buy in good faith, without notice, and did pay twelve hundred dollars for the land.

The finding is that the conveyance was made to defraud creditors, and that it was "received by Louisa Stringer and the plaintiff for that purpose." We did not, therefore, indulge in presumptions of fraud, but accepted the direct find-

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ing of the trial court upon this point. We accepted this fact, and from it assumed, as the law requires us to do, that the appellee's position was not such as entitled him to come into a court of equity, assert the title founded in fraud, and thereby defeat an innocent purchaser for value. We did not decide that if he had secured a perfect title prior to the time the good faith purchaser secured his conveyance, the latter could have prevailed, for the reason that this was not the question before us. The question, as we understood it, and still understand, is, Will a court of equity assist a fraudulent grantee to make good his corrupt and fraudulent title at the expense of a good faith purchaser?

Counsel cite cases to prove that fraud is a question of fact, as though this were a doubtful proposition. We do not doubt this general proposition in the least, nor did we intimate in our former opinion anything of the kind; we accepted as true the finding of the court that the appellee was guilty of fraud, and decided that this fraud might be used to defeat him by an innocent purchaser for value. We adhere to the decision that having entered into a fraudulent and corrupt scheme we will presume that it affected a *bona fide* purchaser, in so far as to enable him to assert his clean and honest title against the appellant's corrupt and fraudulent one. We decided, and we meant to decide, that fraud as a fact was found to exist, and that as it did exist, and as the appellee was both a volunteer and a wrong-doer, he can not defeat a *bona fide* purchaser by any title founded on that fraud.

Counsel are wrong in asserting that the opinion infers fraud as a matter of law; it does no such thing; but it does declare, and rightly, that where fraud is found to exist as a fact, the court will attribute to that fraud its legal consequences.

The former opinion does not controvert the general doctrine declared in *Etter v. Anderson*, 84 Ind. 333, that only creditors can set aside a conveyance made to defraud them; but this is not the question here, for here there is no attempt to set aside a perfected conveyance, but a resistance to a vol-

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untee's making good, through the aid of a court of equity, his corrupt and fraudulent title, against a purchaser in good faith who has paid full value. This question was not presented in *Etter v. Anderson*, *supra*, and of course was not decided. *Paine v. Doe*, 7 Blackf. 485, does sustain our former opinion, as does also the case of *Second Nat'l Bank v. Brady*, 96 Ind. 498, *vide p.* 506.

Petition overruled.

Filed June 27, 1885.

No. 10,605.

GORDON v. LEE.

MORTGAGE.—*Foreclosure*.—*Sheriff's Sale*.—*Redemption*.—*Lis Pendens*.—G. sued to foreclose a senior mortgage, making the junior mortgagee a party, and pending the suit he became assignee of the later mortgage. Without amendment of the complaint the case resulted in a foreclosure of the senior mortgage, a sheriff's sale to L., and at the proper time a deed by the sheriff to L.

Held, that after the lapse of a year from the sheriff's sale G. had no right to maintain a suit to redeem therefrom or to foreclose the junior mortgage.

From the Elkhart Circuit Court.

J. M. Vanflee, for appellant.

J. H. Baker and *J. A. S. Mitchell*, for appellee.

NIBLACK, J.—The complaint in this case was in the nature of a bill to redeem a lot, or small parcel of land, in the city of Elkhart, from a sheriff's sale upon the foreclosure of a senior mortgage upon it, and to foreclose a junior mortgage held by the plaintiff.

It was shown by the evidence that Frances M. Rittenhouse and George W. M. Harper, on the 9th day of January, 1872, executed to one Henry Ray a mortgage on the lot in question to secure the payment of a sum of money therein specified; that sometime afterwards Rittenhouse and Harper sold and conveyed the lot to Edwin D. Foster and Charles A. Foster,

102	135
153	062
102	126
161	318

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subject to the mortgage, and, to secure the payment of the purchase-money, took from them two promissory notes and a junior mortgage on the same lot, which, as well as the first mortgage, was recorded in due time; that thereafter Ray sold and transferred his debt and mortgage to Alexander Gordon, the appellant here; that Gordon thereupon commenced a suit against Rittenhouse and Harper and Edwin D. Foster and Charles A. Foster to foreclose the mortgage thus transferred to him by Ray, also making one George H. Foster a defendant to the action, upon the assumption that he had become a subsequent purchaser of the lot, and had assumed to pay the senior mortgage; that during the pendency of this suit Gordon purchased from Rittenhouse and Harper, and took from them an assignment of the notes and junior mortgage taken by them from Edwin D. Foster and Charles A. Foster, but without amending his complaint, or otherwise noticing of record such junior mortgage, took judgment and a decree of foreclosure upon the first mortgage; that Gordon caused an order of sale to be issued upon that decree, and at a sheriff's sale held thereunder Mrs. Mary E. Lee, the appellee in this appeal, became the purchaser for the amount of principal, interest and costs due upon the decree; that after the time for redemption from the sheriff's sale had expired, no one in the meantime having assumed to redeem it, Mrs. Lee received a sheriff's deed for the lot and went into possession.

Upon these facts the circuit court made a finding that the appellant was not entitled either to redeem the lot from the sheriff's sale, or to have a foreclosure of the junior mortgage as against Mrs. Lee, and, after overruling a motion for a new trial, which challenged the sufficiency of the evidence, rendered final judgment in favor of Mrs. Lee. There were other defendants against whom certain proceedings were also had, but the appeal in this case is only from the judgment in favor of Mrs. Lee.

This suit was prosecuted upon the theory that as no notice

was taken of the junior mortgage in the proceedings to foreclose the senior mortgage, no one connected with or interested in the junior mortgage was in any manner concluded by such proceedings; that hence the appellant, as the holder of the junior mortgage, stood in the same relation to the decree of foreclosure upon the senior mortgage as he would if he had not been a party to that decree, and was not, in consequence, limited to one year's time in which to redeem from the sheriff's sale.

The doctrine is well settled in this State that the rights of a junior encumbrancer are in no wise affected by the foreclosure of a senior mortgage, unless he is made a party to the proceeding which results in such foreclosure. *Holmes v. Bybee*, 34 Ind. 262; *Coombs v. Carr*, 55 Ind. 303; *Hasselman v. McKernan*, 50 Ind. 441; *Hosford v. Johnson*, 74 Ind. 479; *Cummings v. Pottinger*, 83 Ind. 294.

Upon general principles, every encumbrancer of real estate is entitled to his "day in court" before he is concluded, and when a junior encumbrancer has not had his day in connection with proceedings to foreclose a senior mortgage, he is entitled to redeem from such senior mortgage independently of the time limited by the statute. :

In the case of *Holmes v. Bybee*, *supra*, it was said, that "in case of a sale on foreclosure, where subsequent encumbrancers, by judgment or mortgage (and possibly prior ones), are made parties, but fail to set up their claims and procure the order for payment according to priorities; such encumbrancers, we think, come within the letter and spirit of the statute, and may redeem according to its terms, and not otherwise. They have had their day in court; the proceedings against them, therefore, are valid, and they may have such redemption as the statute provides, and none other."

Continuing, and referring to the redemption law of 1861, the court in that case further said: "The statute in question ought not, in our opinion, to be construed as a general limitation law, cutting off all rights of redemption after the ex-

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piration of a year from the sale. Statutes may well limit the time within which an action shall be brought, or a right asserted, after it accrues, because the party having the cause of action or the right knows, or is supposed to know, when it accrued; and, consequently, he knows when the statute begins to run, and when he will be barred."

The conclusion inferentially reached in that case was, that the right of a junior encumbrancer to redeem was limited by the statute to one year, except where such encumbrancer was not a party to, and hence presumptively had no knowledge of, the proceedings to foreclose the senior mortgage. The doctrine of that case was reasserted, and fully approved, by the more recent case of *Cummings v. Pottinger*, *supra*, and up to this time stands unquestioned in this court.

In the case before us the appellant was not only a party to, but was the moving party in, the proceedings to foreclose the senior mortgage. After acquiring the junior mortgage he stood chargeable with notice of all that pertained to both mortgages. He might have amended his complaint and demanded the foreclosure of both mortgages. He seemingly preferred, nevertheless, to ignore the existence of the junior mortgage, and to take a decree for the sale of the equity of redemption upon which only the junior mortgage was operative as a lien. He then caused and permitted the entire lot to be sold to, and purchased by, a stranger to the decree for only the aggregate amount due upon the senior mortgage.

Whether, under the circumstances, the appellant was guilty of such *laches* as would have restrained him from redeeming at any time is a question we have not considered. It is sufficient for us to hold, as we feel constrained to do, that he was estopped from redeeming after the statutory year had expired.

The judgment is affirmed, with costs.

MITCHELL, C. J., having been of counsel in this cause, took no part in its decision.

Filed May 25, 1885.

Furnas v. Friday.

No. 11,586.

FURNAS v. FRIDAY.

FRAUD.—Scienter.—Pleading.—It is not necessary to aver in a complaint to recover for damages resulting from a fraudulent representation, that it was known to be untrue by the person by whom it was made.

SAME.—Where there is an honest purpose, and no intention or attempt to deceive, nor any reckless statement, there is no legal fraud, although the statement may not be true; and a complaint which merely shows that a statement was made which was not true is insufficient on demurrer.

From the Porter Circuit Court.

A. L. Jones, F. P. Jones and J. W. Rose, for appellant.

W. Johnston, for appellee.

ELLIOTT, J.—The third paragraph of the appellee's complaint, omitting the formal parts, reads thus: "The plaintiff was desirous of purchasing and stocking his farm with a number of good, healthy, sound sheep, in addition to the flock he then owned and had on said farm, and the defendant, hearing of plaintiff's desire to so purchase sheep, represented and stated to him that he, the defendant, had a flock of good, healthy, sound sheep, free from disease of all kind, and caused plaintiff to look at said sheep, which then appeared sound and free from disease, and the defendant repeated his representation that the sheep were sound and free from disease, and the plaintiff, acting and relying on the representations of the defendant, as the defendant well knew, bought the sheep for the price of three hundred and twenty-five dollars, and took them to his farm, and so relying on said representations, placed sheep so bought by him in the field with his flock of sound and healthy sheep; that the sheep so purchased of the defendant were not sound or healthy, but were infected with a fatal and contagious disease, known as the scab."

The modern doctrine is that fraud may exist without knowledge of the untruth of the representations made to induce a party to enter into a contract. The text-writers fully approve

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the doctrine, and it has found favor in this court. *West v. Wright*, 98 Ind. 335; *Roller v. Blair*, 96 Ind. 203; *Bethell v. Bethell*, 92 Ind. 318; *Brooks v. Riding*, 46 Ind. 15; *Krewson v. Cloud*, 45 Ind. 273; *Booher v. Goldsborough*, 44 Ind. 490; *Frenzel v. Miller*, 37 Ind. 1; S. C., 10 Am. R. 62. The third paragraph of the complaint is, therefore, not bad, for the reason that it does not aver that the defendant knew the representations made by him were untrue.

Although it is true that a complaint seeking a recovery for injuries arising from misrepresentations need not allege that the defendant knew that his representations were false, it is necessary that it should state facts showing that they were fraudulent. Representations made for an honest purpose, and with fair reason for believing them to be true, can not be deemed to constitute fraud, although it may turn out that they were not true. It is clear that the paragraph before us does not charge fraud, for it does not aver that there was any purpose to defraud, nor that there was any reckless misstatement. On the contrary, the fair conclusion from the facts stated is, that the appellant acted honestly, stated what he believed to be true, and gave the plaintiff a full opportunity to examine the sheep for himself. If the complaint had shown that the defendant professed to be an expert, and that he induced the plaintiff to rely upon his superior judgment or skill, or if it had shown that the defendant made the representations for a fraudulent purpose, or had recklessly made them, a very different case would have been presented. Where there is an honest purpose, and neither recklessness nor carelessness, there can be no fraud, for fraud involves moral turpitude, and where there is neither a dishonest purpose nor recklessness, there can be no moral wrong. *Watson Coal, etc., Co. v. Casteel*, 68 Ind. 476.

The fourth paragraph of the complaint is substantially the same as the third, and must be held bad for the same reason that the latter paragraph is condemned.

Judgment reversed.

Filed May 25, 1885.

Grubbs *et al.* v. Barber.

No. 11,895.

GRUBBS ET AL. v. BARBER.

PROMISSORY NOTE.—*Consideration.*—*Failure of.*—*Pleading.*—To a complaint upon a promissory note, an answer that the sole consideration was the conveyance by deed, with covenants, of a tract of land to which the plaintiff had no title whatever, but falsely and fraudulently represented that he had a good title, which he knew to be false, upon which the defendant relied, is bad on demurrer.

From the Kosciusko Circuit Court.

J. D. Wildman and *L. W. Royse*, for appellants.

T. R. Marshall and *W. F. McNaghy*, for appellee.

NIBLACK, J.—Suit by Edwin L. Barber against Albert M. Grubbs and Jesse Grubbs, upon a promissory note for \$250, with interest at eight per cent., and including attorney's fees.

The defendants answered: *First.* The general denial. *Second.* That the note was given without any consideration. *Third.* That the defendant Albert M. Grubbs was the principal in, and the said Jesse Grubbs only surety upon, the note; that the note was executed in consideration of a pretended sale and conveyance by the plaintiff to the said Albert M. Grubbs of a certain lot or parcel of ground, particularly described; that at and before the time at which said lot was so sold and conveyed to him, the said Albert M. Grubbs, the plaintiff, falsely and fraudulently represented to him, the said Albert, that he held said lot by a good and sufficient title in fee simple, and had a good right to sell and convey the same; that the said Albert M. Grubbs, relying upon such false and fraudulent representations, and believing them to be true, purchased, and received a deed for, said lot from the plaintiff, and, with his co-defendant, executed the note sued on; that said representations were false, and known to be so by the plaintiff when he so made the same; that the plaintiff was not then the owner of the lot in question in fee simple, or by any other good title; that, on the contrary, said lot was then held and owned by the heirs of one Martha Hayes, deceased.

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Wherefore it was averred that the consideration of the note had failed.

A demurrer was sustained to this last paragraph of the answer, and that was followed by a finding and judgment in favor of the plaintiff for the amount of the note, with an additional sum for interest and attorney's fees.

Error is assigned only upon the decision of the circuit court sustaining the demurrer to the third paragraph of the answer as above set forth. The facts contained in that paragraph might have constituted an important element in an action for the rescission of the contract for the purchase of the lot, but they were insufficient as a defence to this suit. When nothing is averred to the contrary, the inference is that a deed of conveyance carries with it the possession of the property conveyed, and, acting on that inference in the present instance, we must assume that Albert M. Grubbs was at the time of the commencement of this suit, as well as at the time of the trial, in possession of the lot purchased by him of the plaintiff.

It is a well settled legal conclusion, supported by elementary writers and a long line of cases in this State, that where a deed is made and accepted, and possession taken under it, want of title in the vendor will not enable the purchaser to resist the payment of the purchase-money, or recover more than nominal damages on the covenants in his deed, while he retains the deed and remains in possession, and has been subjected to no inconvenience or expense on account of his alleged or supposed defective title. *Beal v. Beal*, 79 Ind. 280; *Gibson v. Richart*, 83 Ind. 313.

This question was very fully considered in the recent case of *Marsh v. Thompson*, *post*, p. 272, and on the authority of that case the judgment in this case must be affirmed.

The judgment is affirmed, with costs.

Filed June 17, 1885.

The Indiana, Bloomington and Western Railway Company v. Cook.

No. 11,873.

THE INDIANA, BLOOMINGTON AND WESTERN RAILWAY
COMPANY v. COOK.

PRACTICE.—*Objection to Evidence.*—An objection to evidence on the ground that it is incompetent, without stating in what its incompetency consists, is too general to raise any question for the Supreme Court.

SAME.—*Open and Close.*—*Appropriation of Land for Railroad.*—In a proceeding instituted by a railroad company to appropriate land for the construction of its road, on appeal to the circuit court taken by both parties by the filing by each of exceptions to the assessment of damages, the land-owner has the right to the open and close.

SAME.—*Instructions to Jury.*—When instructions taken together state the law of the case correctly, the fact that one clause therein, considered separately, is doubtful or erroneous, will not constitute ground for reversing the judgment.

From the Madison Circuit Court.

C. W. Fairbanks, J. H. Mellett and E. H. Bundy, for appellant.

J. M. Brown, for appellee.

FRANKLIN, C.—This was a proceeding by appellant to appropriate a portion of the land of appellee for the construction of its road.

Written exceptions were duly filed by each party to the assessment of damages by the appraisers, and the cause thereby appealed to the Henry Circuit Court, and from thence, by change of venue, the cause was transferred to the Madison Circuit Court, where the case was tried upon the issues joined upon the exceptions.

There was a verdict and judgment for the appellee. Appellant filed a motion for a new trial, which was overruled. The error assigned is the overruling of the motion for a new trial.

The reasons for a new trial, which are insisted upon for a reversal of the judgment, are, that the damages are excessive, error in the admission of evidence, in allowing the defendant

102	133
197	287
102	133
131	224
102	133
137	638
102	133
140	306

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to open and close the evidence and the argument to the jury, and in instructions to the jury.

It is first insisted by appellant that the court erred in permitting the appellee to ask certain witnesses, while on the stand, to testify in relation to the value of the land before appropriation, and also after appropriation, and in permitting said witnesses to answer and testify in relation to the same.

The objections made to this testimony in the court below were that it was incompetent, immaterial and irrelevant.

This court has repeatedly held that objections to the admissibility of testimony, in order to be available, must be specifically pointed out, and that the objection that it is incompetent is too general to present any question to this court; that the objection should state wherein the incompetency consists; hence we decide nothing in relation to the competency of such testimony. See the cases of *McClellan v. Bond*, 92 Ind. 424, *Mills v. Winter*, 94 Ind. 329, *Stanley v. Sutherland*, 54 Ind. 339.

It is not insisted by appellant in its brief, and can not reasonably be said, that the testimony was immaterial or irrelevant; we, therefore, find no error in the admission of evidence.

The question as to which party was entitled to open and close the evidence and argument to the jury, presents considerable difficulty; there is a want of uniformity in the authorities on this question.

In South Carolina, it is held that the appellant has the open and close on the appeal. See the case of *Charleston, etc., R. R. Co. v. Blake*, 12 Rich. L. 634. And where the landholder appealed from the assessment to the circuit court, it has been held in this State that he has the right to open and close. *Evansville, etc., R. R. Co. v. Miller*, 30 Ind. 209. The following language is used therein: "Inasmuch as no question but the measure of damages was presented in the circuit court, there was no error, we think, in giving the appellee the right to begin. He had the affirmative of the question."

In Georgia, it has been held that the party originally mov-

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ing has the open and close on appeal. *Harrison v. Young*, 9 Ga. 359.

In New York, it has been held that the commissioners decide which party shall have the open and close, and their decision is final. *Albany, etc., R. R. Co. v. Lansing*, 16 Barb. 68.

In Massachusetts, it has been held that the owners of the land have the affirmative of the issue as to the value of the land, and hence the right to open and close, without regard to which party initiated the proceedings or prosecuted the appeal. And the same rule has been established in Minnesota and Oregon. See the cases of *Burt v. Wigglesworth*, 117 Mass. 302, *Minnesota, etc., R. R. Co. v. Doran*, 17 Minn. 188, *Oregon, etc., R. R. Co. v. Barlow*, 3 Oregon, 311, *Connecticut River R. R. Co. v. Clapp*, 1 Cush. 559. The same language is substantially used by Mills on Eminent Domain, section 92.

In the case of *Connecticut River R. R. Co. v. Clapp*, *supra*, it is said: "In cases where a reassessment of damages is to be made by a jury, after an assessment has been made by the commissioners, it is immaterial which party makes the application for such reassessment. The party claiming damages, the same being unliquidated, and to be settled by the jury, has the right of opening and closing the cause. * * * The only question for the jury in this case was a question of damages, which they were bound to assess without any regard to the previous assessment by the commissioners. There seems, therefore, no reason for allowing the petitioners to open and close."

In the case of *Burt v. Wigglesworth*, *supra*, the following language is used: "This proceeding is not like an ordinary action at law. Although the petition of the agent of the United States is the first step in the proceeding, nothing is submitted to the jury but the appraisement and valuation of the land to be taken. The affirmative of that issue rests upon the owners of the land, and, as in other cases of the as-

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assessment of compensation to be made for private property or rights taken for the public use, they have the right to open and close, without regard to the question by which party the petition is filed upon which the trial by jury is had." See authorities cited in support thereof.

In the case under consideration both parties filed exceptions to the report of the appraisers, and thereby both parties appealed to the circuit court. The result of the appeal was to set aside the report of the appraisers, which could not be used for any purpose upon the trial in the circuit court; but the questions of the value of the land taken, and the amount of the damages, had to be tried *de novo*, the same as if there had been no assessment by appraisers. Our statute provides: "That notwithstanding such appeal, such company may take possession of the property therein described, as aforesaid, and the subsequent proceedings on the appeal shall only affect the amount of compensation to be allowed." R. S. 1881, sec. 3907.

In the case of *Grand Rapids, etc., R. R. Co. v. Horn*, 41 Ind. 479, there was an agreement of the parties that the assessment which had been made be set aside, that all other questions be waived, and the amount of the damages was the only question to be determined. No exceptions were filed to the report of the appraisers. The case, by agreement, was appealed to the circuit court for the reassessment of the damages, and in that case this court said: "We are not willing to say that it was error to allow the appellees to open and close." Notwithstanding the agreement, the *status* of the case in the circuit court, in so far as the assessment of damages was concerned, was the same as if it had been appealed by both parties upon that question. See the cases of *McMahon v. Cincinnati, etc., R. R. Co.*, 5 Ind. 413, and *Swinney v. Fort Wayne, etc., R. R. Co.*, 59 Ind. 205.

The real question between the parties does not depend upon which party excepts and appeals; but the same question is to be tried, whether the appeal is taken from the award by the

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petitioner or the land-owner. And as this court has held that where the appeal is taken by the land-owner he shall have the open and close, and where the appeal is taken by agreement the land-owner shall have the open and close, and in accordance with what seems to be the weight of authority outside of this State, we hold that when the exceptions have been filed and an appeal taken by both the parties, the land-owner has the right to open and close the cause. There was no error in this ruling of the court.

Of the instructions complained of in the motion for a new trial, the following language, in the second instruction, is objected to by appellant in its brief: "And if you find from a preponderance of the evidence that the defendant Cook has sustained damages from the appropriation of his real estate, the measure of his damages would be the value of the land appropriated and taken, together with the damages, if any, to the residue of the land owned by him, by reason of such appropriation; also the costs of fences necessary, if any, and their maintenance; also inconveniences, if any, that are occasioned by such appropriation by the defendant, in the use and enjoyment of his farm."

The objection to this clause of the second instruction is, that it tells the jury they may allow double damages, first, general (that includes all), and then specific added thereto.

We do not think the language is liable to that construction, especially when taken in connection with the whole instruction. The first clause thereof tells the jury that the question for them to determine is the amount of damages, if any, that the defendant has sustained on account of the appropriation; and in the second clause, in estimating the damages, the court first calls the attention of the jury to the direct damages to the land, the value of the land taken and diminution of the value of the other lands of the defendant not taken, and tells the jury that they may also find the consequential damages, such as the costs of fences and inconvenience in the use of the farm. The instruction might have been

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worded differently, so as to make its meaning more definite, by the use of the word "including," instead of "also." But we do not think the language was calculated to mislead the jury, and cause them to assess double damages. Taking all the instructions together, we think the law was correctly stated to the jury, and in such cases, if one clause of an instruction, taken abstractly, should be doubtful or erroneous, it is harmless, and not sufficient ground for reversing the judgment.

There was no error in overruling the motion for a new trial. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed April 4, 1885; petition for a rehearing overruled June 24, 1885.

No. 11,868.

THE CARTHAGE TURNPIKE COMPANY v. ANDREWS.

CONTINUANCE.—*Absent Witness Incompetent.*—A continuance should not be granted for the absence of a witness, who if present would not be competent to testify if objected to; e. g., a physician whose knowledge of the facts came to him in his professional capacity.

EVIDENCE.—*Opinions.*—*Non-Expert Witness.*—A witness, not an expert, is competent to give an opinion as to the health and physical condition of another, based upon facts within his personal knowledge, which should first be stated. For reference to many authorities on the subject see opinion.

SAME.—*Declarations as to Injuries.*—Statements and complaints made by a party injured as to his sufferings and symptoms at the time, whether made to his surgeon or to others, are competent evidence in his behalf in a suit to recover for his injuries.

SAME.—*Damages.*—In a suit for personal injury, where the complaint avers that the plaintiff was a physician, and by reason of the injury is unable to follow his profession, it is competent to prove these facts, and also what his practice prior to the injury was worth; also the extent of his injury and its probable duration.

MEASURE OF DAMAGES.—*Personal Injury.*—*Case Followed.*—*City of Indiana-*

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polis v. Gaston, 58 Ind. 224, announces a correct rule for the measure of damages in a suit for personal injury.

EXCESSIVE DAMAGES.—Ten thousand dollars will not be held excessive damages by the Supreme Court for personal injury to a physician whose professional earnings were two thousand dollars per annum, and who suffered greatly, was rendered permanently unable to practice afterwards, and must sooner or later die from the injury.

From the Henry Circuit Court.

C. G. Offutt, R. A. Black, J. H. Mellett, E. H. Bundy, W. A. Cullen, B. L. Smith and W. J. Henley, for appellant.
J. A. New and J. W. Jones, for appellee.

ZOLLARS, J.—One of appellant's bridges, over which appellee was driving, broke and fell, and he was thereby injured. He brought this action to recover damages, charging appellant with negligence in not maintaining the bridge in a proper and safe condition.

Besides the allegations of other injuries received, it is averred in the complaint that appellee's spine was so permanently injured that he can not, nor will he ever be able to, follow his profession as a practicing physician.

Appellant predicates one of its assignments of error upon the overruling by the court below of its motion for a continuance.

In the affidavit filed in support of the motion it is stated that it is expected to prove by an absent witness, that prior to the injuries complained of appellee was "afflicted with spinal disease and trouble, of the same character now alleged in said complaint to have been caused by said alleged injury, and to such an extent that said plaintiff claimed and alleged to said witness that he was unable to practice his profession, and would have to abandon it."

It is further stated in the affidavit, "that said witness is a physician, and prior to said alleged injury to the plaintiff, was consulted as such physician by said plaintiff in regard to his said spinal affection and disease," etc.

Aside from the question that might have been made here,

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that the affidavit is not in the record, not having been brought into it by bill of exceptions or order of court, and aside from other objections to the affidavit, some of which are, perhaps, well taken, the objection that the absent witness is shown to be incompetent to testify to the facts alleged to be within his knowledge, is a fatal objection. It is clearly shown by the affidavit that all the information the absent witness has is what came to him as the physician of appellee; such information can not be divulged by the physician as a witness. *Masonic Mut. Benefit Ass'n v. Beck*, 77 Ind. 203 (40 Am. R. 295); *Excelsior Mut. Aid Ass'n, etc., v. Riddle*, 91 Ind. 84; *Penn Mut. L. Ins. Co. v. Wiler*, 100 Ind. 92.

Appellee, probably, might have waived the point, and allowed his physician to testify, but we can not indulge the presumption that he would have done so in order to overthrow the ruling of the court below, especially when he resisted the continuance, and argues here the incompetency of the witness to testify to the facts stated in the affidavit for continuance.

It is argued at length by appellant's counsel, that the motion for a new trial should have been sustained, because of the admission of improper testimony by the trial court.

It is urged on the part of appellee that no such question is before us, because the record does not show that proper objections were made and exceptions saved. In some instances that is so, and without extending this opinion to point out the instances where such is the case, we notice the points in the argument where the objections and exceptions seem to have been properly made and saved.

James O. Butler, one of appellee's witnesses, testified that he had known him since his boyhood, and had seen him frequently, and during the five years preceding the trial had lived near him. After having stated this, the following questions, over appellant's objections, were put to the witness by appellee's counsel, and the following answers made, viz.:

"Question. What has been his health and physical condition from the time you have known him up to the time of

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his injury? Answer. Why, his health up to that time was good; he seemed to be stout and hearty, so far as I know.

"Ques. What was his physical appearance? Ans. Why, he appeared to be stout and hearty.

"Ques. Was there any other appearance? Ans. He was a good, sound-looking man, with some life about him.

"Ques. How was he as to flesh before this injury? Ans. He was fleshy; a good deal fleshier than he is now.

"Ques. How was he as to weight? Ans. He was a good deal heavier than he is now; he used to weigh from one hundred and eighty to one hundred and eighty-five pounds.

"Ques. Since the injury what has been the condition of his health? Ans. He has had but very poor health.

"Ques. What has been his physical appearance? Ans. He has been very weak and slow; he does not seem like the same man hardly, in physical strength.

"Ques. How as to his flesh and weight since the injury? Ans. Well, he has fallen off considerably.

"Ques. What changes, if any, have you observed in the expression of his countenance? Ans. He did not look like the same man hardly; that is, to the best of my knowledge; he did not seem to notice things like he used to."

James Anderson, another of appellee's witnesses, testified that he had known him intimately and seen him often during the last twenty-four years. After having thus testified, the following questions, over appellant's objections, were propounded to the witness, to which he made the following answers:

"Question. What was his physical condition as to health up to the time of the injury? Answer. Well, his appearance looked like he might be a stout man; I always supposed he was from his appearance; of course, I am no doctor; he had a healthy look.

"Ques. What was his condition as to health and physical condition on yesterday? Ans. Why, he looked very much worn down to what he was the last time I saw him."

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The substance of the testimony of these witnesses, taken as a whole, is that from their long and intimate acquaintance with appellee, from their observations of him, and his physical appearance, certain characteristics of which they gave, in their judgment, he was a stout and healthy man before the injury, and sick and not so stout thereafter. Taken as a whole, the most that can be fairly said is that the testimony amounts to the opinions of the witnesses, based upon their observation and the facts stated.

It would have been more orderly to have drawn out all of the statements of the witnesses before asking their judgment or opinion, but as the jury were put in possession of the facts as a part of the testimony in chief, it would seem that the manner and order in which it was done ought not to be fatal to appellee's case. It should be observed, too, that the objections below were not that the witnesses had not stated the facts upon which they based their opinions. The objections were broad and general ones, that the witnesses could not give their opinion, because they were not experts.

Regarding the testimony as we think it should be regarded, it is brought within the general rule that non-expert witnesses may give their opinions, if they state, as far as possible, the facts and observations upon which they are based. That non-expert witnesses may thus give their opinions is well settled by the adjudications of this court. *House v. Fort*, 4 Blackf. 293; *City of Indianapolis v. Huffer*, 30 Ind. 235; *Benson v. McFadden*, 50 Ind. 431; *Holten v. Board*, etc., 55 Ind. 194; *Coffman v. Reeves*, 62 Ind. 334; *State, ex rel., v. Newlin*, 69 Ind. 108; *Mills v. Winter*, 94 Ind. 329.

That a non-expert may give an opinion at all, is the rule of necessity. He must, in all cases, so far as possible, state the facts upon which he bases his opinions. When the case is one in which all the facts can be presented to the jury, then no opinion can be given, because the jury are as well qualified as the witness to form a conclusion. But there are cases where the witness can not put before the jury, in an in-

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telligible and comprehensible form, the whole ground of his judgment or opinion. When questions as to the conditions of the mind and body are the questions in issue, there are often many things in the acts, deportment and appearance of the party which create a fixed and reliable judgment in the mind of the observer that can not be conveyed in words to the jury. That a person appears to be sad or sick may well be known by observation, and yet there is no way to describe the appearance except by the words that necessarily embody the conclusion reached by observation. In such cases, if the witness states that he is acquainted with, has had opportunity to, and has observed the party, this, it has been held, is sufficient to render the witness competent to state the condition of the party mentally or physically. The weight to be given to such evidence, of course, will depend upon the intelligence of the witness, the intimacy of his acquaintance with the party, and upon other things that may appear by the examination in chief, and by a cross-examination. *Bennett v. Meehan*, 83 Ind. 566 (43 Am. R. 78), and cases there cited.

In this case the court quoted with approval from 1 Whart. Ev., section 512: "So an opinion can be given by a non-expert as to matters with which he is specially acquainted, but which can not be specifically described." *Loshbaugh v. Birdsell*, 90 Ind. 466. In this case, the court quoted with approval from 1 Greenl. Ev., section 440, as follows: "Non-experts may give their opinions on questions of identity, resemblance, apparent condition of body or mind, intoxication, insanity, sickness, health, value, conduct, and bearing, whether friendly or hostile, and the like." The same quotation was made with approval in the case of *Johnson v. Thompson*, 72 Ind. 167 (37 Am. R. 152). See, also, *Yost v. Conroy*, 92 Ind. 464 (47 Am. R. 156); *Indiana, etc., R. W. Co. v. Hale*, 93 Ind. 79; *Goodwin v. State*, 96 Ind. 550; *Hamm v. Romine*, 98 Ind. 77; *Wilkinson v. Mosely*, 30 Ala. 562; *Blackman v. Johnson*, 35 Ala. 252; *South and North Ala. R. R. Co. v. McLendon*, 63 Ala. 266; *Chicago, etc., R. R. Co.*

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v. *George*, 19 Ill. 510; *Willis v. Quimby*, 11 Foster (N. H.) 485; *Elliott v. Van Buren*, 33 Mich. 49 (20 Am. R. 668); *Culver v. Dwight*, 6 Gray, 444; *Irish v. Smith*, 8 S. & R. 573; *Parker v. Boston, etc., Co.*, 109 Mass. 449; Best Prin. Ev. 494; *Commonwealth v. Sturtivant*, 117 Mass. 122 (19 Am. R. 401); *Evans v. People*, 12 Mich. 27; Abbott Trial Ev. 599, 600. Under our own cases, and those above cited, some of which carry the rule further than it is necessary for us to extend it here, the testimony objected to was competent.

Physicians were allowed to testify to declarations and complaints made to them by appellee as to his sufferings when they were examining and treating him for the injuries. Other witnesses were allowed to give the declarations and complaints of appellee to them in relation to his loss of sleep, appetite and taste, freezing in summer time, and sufferings in other respects.

These declarations and complaints were made at various times from the receiving of the injury until the bringing of the action. They were not by way of narrations of past sufferings, but had reference to the times when made. This evidence, we think, was competent and proper. For whatever appellee may have suffered mentally or physically during the period from the injury, as well as for the permanent loss of health, he is entitled to recover, if he is entitled to recover at all. And to show the extent of the suffering, his declarations and complaints at the time, or at any one time, are competent. How much weight should be given to such declarations, is a question for the jury. This court has approved the following from 1 Greenl. Ev., section 102: "Wherever the *bodily or mental* feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are also original evidence. If they were the natural language of the affection, whether of body or mind, they furnish satisfactory evidence, and often the only proof of its existence. And whether they were real or feigned is for

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the jury to determine." See cases cited in the foot notes. *Town of Elkhart v. Ritter*, 66 Ind. 136; 1 Phillip's Ev. 180, 182; Abbott Trial Ev. 599, and notes; *Rogers v. Crain*, 30 Texas, 284; *Elliott v. Van Buren*, *supra*. And so, too, it was proper for appellee to testify as to his suffering, and the manner and various ways in which he was disabled and made to suffer by the injuries received.

In both paragraphs of the complaint it is averred that appellee has been a practicing physician, and that by the injuries received he has been rendered permanently unable to follow his profession, to his damage. Under these averments it was competent for him to prove what his practice had been worth prior to the injuries, and that by the injuries he was rendered permanently unable to follow his profession. *Town of Elkhart v. Ritter*, *supra*; *City of Logansport v. Justice*, 74 Ind. 378 (39 Am. R. 79); *South and North Ala. R. R. Co. v. McLendon*, *supra*; Abbott Trial Ev. 598.

It was also competent for the attending physicians to testify as to the character and extent of the injuries, their probable duration, and that they would disqualify appellee to follow his profession. This was one of the material questions in the case, and could in no way be so readily and safely determined as by the testimony of physicians, who are supposed to be competent to form a more correct judgment upon such matters than the jury could, without the aid of such testimony. Abbott Trial Ev. 600, and cases cited; *City of Indianapolis v. Gaston*, 58 Ind. 224.

By the motion for a new trial the question was made below, and is urged here, that the trial court erred in giving the seventh instruction. The main objection urged against the instruction is that it did not lay down a correct rule for the measure of damages. With but one or two unimportant changes, it is an exact copy of an instruction (No. 11) approved in the case of *City of Indianapolis v. Gaston*, *supra*. That case is sufficient authority in support of the instruction.

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No plausible objection can be made that the instruction is not applicable to the evidence under either paragraph of the complaint.

The verdict and judgment rest upon evidence which tends to sustain them, and hence this court can not overthrow them upon the weight of the evidence.

The question is made and urged with much earnestness that the damages are excessive. Ten thousand dollars was awarded by the jury; but in view of appellee's injuries we do not feel that this court should pronounce that amount excessive. The evidence shows that appellee has suffered much, that he has been rendered permanently unable to practice his profession, which, prior to the injuries, brought to him \$2,000 per year, and that the injuries are such as will sooner or later result in death. *Town of Westerville v. Freeman*, 66 Ind. 255.

That appellant may not be a wealthy corporation can no more influence courts than if it were wealthy. The question in such cases is, not the financial ability of the wrong-doer, but the damages to the injured party.

After an examination of the several questions discussed by counsel, we have reached the conclusion that there is no error in the record for which the judgment should be reversed. It is, therefore, affirmed, with costs.

Filed May 26, 1885.

No. 12,276.

THE VIGO AGRICULTURAL SOCIETY v. BRUMFIEL.

BAILMENT.—*Agricultural Society.—Liability of to Exhibitors.*—An agricultural society that invites persons to place property on exhibition at one of its fairs, and promises to take care of articles placed in its charge by exhibitors, is a bailee for hire, and it is responsible for a loss of the property if caused by its negligence in failing to perform, the duty created by its promise.

SAME.—*Contract.—Consideration.*—Where parties agree upon a consideration of an indeterminate value, the courts will not disturb the contract.

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upon the ground of inadequacy of consideration, and the act of an exhibitor, in placing his property in charge of an agricultural society in answer to its published invitation and promise to take care of the property, constitutes such a consideration.

DEMURRER TO EVIDENCE.—A demurrer to evidence admits all the facts which the evidence tends to prove, and all reasonable inferences therefrom; and the court can not in such case weigh the evidence, nor can it consider evidence favorable to the party demurring if there is a conflict.

CONTRACT.—*Publication of Offer.*—*Acceptance.*—Where there is a publication of an offer, the contract is complete when it is accepted, provided the acceptance takes place prior to the withdrawal of the offer.

From the Vigo Superior Court.

S. C. Davis and *S. B. Davis*, for appellant.

I. N. Pierce, *T. W. Harper* and *B. E. Rhoads*, for appellee.

ELLIOTT, J.—Gathered into a condensed form, the material averments of the appellee's complaint are these: The Vigo Agricultural Society is an association organized under the laws of the State for the purpose of conducting fairs for the exhibition of agricultural products, manufactured articles, and other things; prior to September, 1883, the society issued advertisements inviting persons to place articles on exhibition at a fair to be held in that month. The society agreed to take care of articles placed on its ground by exhibitors, the appellee, in response to the invitation of the society, did put a gun of which he was the owner on exhibition in the place appropriated to that purpose, and, while the gun "was in the care and keeping of the society," it negligently and carelessly suffered it to be stolen, without any fault on the part of the appellee.

The question presented by the demurrer to the complaint is not as to the general duties and liabilities of an agricultural association, but the question is as to the law upon the facts pleaded. The case made by the complaint is one of bailment. The bailment was not a gratuitous one, for the reason that the exhibition of the gun, in response to the invitation contained in the advertisement of the appellant, constituted a

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consideration for the undertaking. It may be true that both parties derived a benefit, but this did not strip the contract of its character, that of a bailment for reward. The reward was not, it is true, in money, but it was nevertheless a reward in the form of an act performed at the request of the bailee. An association which invites persons to supply articles to enable it to conduct an exhibition receives some consideration from the person who responds to its invitation by placing articles in its care for exhibition.

Where a consideration of an indeterminate value is agreed upon by the parties, the courts will not undertake to determine its adequacy, but will respect the judgment of the parties and enforce their contract. *Wolford v. Powers*, 85 Ind. 294; S. C., 44 Am. R. 16; *Williamson v. Hitner*, 79 Ind. 233; *Neidefer v. Chastain*, 71 Ind. 363; S. C., 36 Am. R. 198; *Smock v. Pierson*, 68 Ind. 405; S. C., 34 Am. R. 269; *Baker v. Roberts*, 14 Ind. 552; *Hardesty v. Smith*, 3 Ind. 39. The complaint avers that there was an agreement to take care of the gun, and the facts stated show a sufficient consideration for the agreement, and, as the contract was one of bailment for hire, the bailee is responsible for the loss resulting from its negligence. The agreement bound the society, and if its negligence caused the loss it must respond. What the rule would be where there was no promise to bestow care upon the articles exhibited, we need not decide, for here there was, as the complaint avers and the demurrer admits, a promise which created a bailment.

The appellant demurred to the evidence, and it is necessary, before entering upon the discussion of the main question, to ascertain and state the rules which must guide us in considering the evidence. These principles are well settled:

First. The demurrer admits all the facts proved, admits the existence of all the facts which there is evidence tending to establish, and admits all reasonable inferences which may be drawn from the facts and the evidence. *Wright v. Julian*, 97

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Ind. 109, authorities cited p. 110; *Willcuts v. Northwestern Mut. L. Ins. Co.*, 81 Ind. 300, and authorities cited.

Second. "On a demurrer to evidence, everything will be taken against the party demurring which the evidence tends to prove, including every fair inference to be drawn from the evidence." *Eagan v. Downing*, 55 Ind. 65; *Pinnell v. Stringer*, 59 Ind. 555; *Radcliff v. Radford*, 96 Ind. 482.

Third. On a demurrer there is no weighing of the evidence; all inferences are against the demurring party; and where there is a conflict, evidence favorable to him can not be considered. *Ruddell v. Tyner*, 87 Ind. 529; *Adams v. Slate*, 87 Ind. 573; *Bethell v. Bethell*, 92 Ind. 318, *vide* p. 325; *Wright v. Julian*, *supra*.

Guided by these rules, our task is to ascertain what facts the evidence tends to prove, what inferences these facts lead to, considered most strongly against the appellant, and, excluding the testimony favorable to it, accept that favorable to the appellee.

The testimony shows that the gun was taken to the office of the secretary of the society, where entries were made by exhibitors; that it was entered in the proper book; that appellee's agent was provided with an exhibitor's tag, directed to attach it to the gun and place it in the "Mechanical Hall," and that he obeyed the directions given him. This hall was a large building, and very insecurely fastened. It was not guarded by any policeman, or by any other person. It was proved that the chief of police of the city of Terre Haute, who was employed to take charge of the policemen engaged about the fair grounds, suggested to one of the principal officers of the society that there should be some policemen stationed about the "hall," but that officer directed him not to place any policemen about it, stating that "there was nothing in it." In making this statement the officer was in error, for there were articles of value in it besides the appellee's gun. From the hall, where it had been placed by the direction of the secretary, it was stolen and carried away. Sometime prior to

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the time the fair was held, the society issued advertisements inviting persons to place articles on exhibition, and these advertisements were seen and read by the appellee, who was induced by them to place his gun on exhibition. In one of the rules issued by the society, and contained in one of its advertising pamphlets, was the following: "The association will keep an efficient police force on the grounds day and night to take care of articles on exhibition, but will not be responsible for any damages."

The clear and, indeed, the only legitimate inference from the evidence is, that the appellant neglected to keep an efficient police force on the grounds. It appears that the attention of its officers was called to the inadequacy of the police; to the fact that one place where valuable articles were kept was wholly without guard or protection. At a few places on the grounds there were policemen on guard, but none about the building where the appellee's gun was placed. So far as that spot was concerned, it was as if there had been no police protection at all supplied.

We do not deem it necessary or proper to discuss the general question as to the duties and liabilities of agricultural societies organized for the purpose of conducting fairs, for here the question is very much narrower. The question here is as to the liability of a society that invites and secures the exhibition of articles at its fair upon the promise to "keep an efficient police force on the ground day and night to take care of articles on exhibition." It may be true that where there is no promise of this character the exhibitor assumes the risk, but, as there is here a promise, that question is not before us, and, of course, is not decided.

It is an elementary principle that where a party publishes an offer to the world, and before it is withdrawn another acts upon it, the party making the offer is bound to perform his promise. An American author says: "I may bind myself contractually by a general proposal to do a particular thing for the benefit of any person who renders me a particular

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service, or takes part with me in a common risk." 1 Whart. Con., section 24. The foundation and extent of this doctrine is well and philosophically discussed by an English writer who has collected many cases of different kinds illustrating the various phases of the subject. Pollock Principles Con. 174. The essential difference between what Pollock calls a contract by advertisement, and an ordinary agreement, is that in the former case there is no complete contract until performance, while in the latter there is a contract as soon as there is an acceptance of the proposal. The principle we have stated finds its most frequent illustration and application in cases of the offer of rewards, but it is by no means confined to such cases. It is the principle which governs in the cases of the publication of time tables and rules by railroad companies. *Crocker v. New London, etc., R. R. Co.*, 24 Conn. 249; *Sears v. Eastern Railroad Co.*, 14 Allen, 433; *Denton v. Great Northern R. W. Co.*, 5 E. & B. 860. It is also the principle which controls in cases of general circular letters, and in prospectuses by joint stock companies and corporations. *Asiatic Banking Corporation, Ex parte*, L. R. 2 Ch. App. Cas. 391; *Maitland v. Bank, etc.*, 38 L. J. Eq. 363; *Warlow v. Harrison*, 1 E. & E. 295; *Adams' Case*, L. R., 13 Eq. 474. In the case before us, the appellee performed the act required of him by the party who issued the advertisement, and the contract was, therefore, complete.

As the appellant promised to do a specified act if the appellee would place his property on exhibition, and as the appellee did do this, it is impossible to hold that the former assumed no duties, without running counter to the best settled and most generally known rules of law. The promise means something, and if it does, then it did create an obligation. Either the promise imposed some duty on the promisor, or it is utterly meaningless; but it is not meaningless, and therefore it did impose some duty, and that duty was, in the very words of the promise itself, to "keep an efficient police force

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on the grounds day and night to take care of articles on exhibition."

If a police force had been kept as promised, then a radically different case would have been before us ; but the clear inference from the evidence is that no force was kept about the hall where the property of the appellee was placed. The reason there were no policemen stationed there was because the appellant was negligently ignorant of the fact that there was at that place the property of exhibitors, put there in response to an invitation and in accordance with the directions of the appellant's officers.

It needs neither the citation of authorities nor the statement of arguments to prove that if one assumes a duty, and negligently omits to perform it, he must answer to the person to whom the duty was owing for the loss occasioned by the negligence.

The liability of the appellant does not arise out of the fact that the gun was stolen, but springs from the fact that there was a negligent omission of the duty which the appellant had assumed. The evidence fully tends to show that the negligent omission of the duty was the cause of the loss, and this is sufficient. It is sufficient where a cause is submitted to a jury, and even in prosecutions for the highest of crimes, that the circumstances lead by a just process of inference to the conclusion reached, and certainly this is sufficient where the defendant demurs to the evidence. The general rule is that conclusions may be deduced from the facts proved, and here there were abundant facts justifying the conclusions of the trial court upon every material point, but the rule is here more liberal to the plaintiff than the general one, for here the demurrer admits all the facts and inferences.

Counsel for the appellant do not refer to or place any stress upon the clause in the society's rules reading, "but will not be responsible for any damages," and it may be that we do an unnecessary thing in noticing it, but we have thought best not to pass it entirely unnoticed. It is evident that the clause

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quoted does not withdraw the promise "to keep an efficient police force on the grounds day and night to take care of the articles on exhibition," but that it simply means that the society will furnish a police force, and, having furnished such a force, will not be responsible for losses. It would violate the plain meaning of the language to give the provision any other interpretation. If the promise to provide a police force had been complied with, then, under the clause quoted, the society would have been absolved from all liability, but the effect of that direct promise is not made null by the clause declaring that the society will not be responsible, for it is very plain that this clause can only be construed to absolve from responsibility in case the promise is kept.

The question as to the regularity of the entry of the gun is settled by the admissions of the secretary of the society, and, upon a demurrer to the evidence, there can be no question made as to the probability or improbability of the testimony.

Judgment affirmed.

Filed May 26, 1885.

No. 12,081.

HASSELMAN ET AL. v. CARROLL ET AL.

SPECIAL VERDICT.—Pleading.—A party can not recover on a cause of action in his favor shown by a special verdict, under an issue involving only a different cause of action.

From the Hamilton Circuit Court.

G. Shirts and *W. R. Fertig*, for appellants.

J. A. Roberts and *T. E. Boyd*, for appellees.

MITCHELL, J.—On the 17th day of April, 1883, L. W. Hasselman & Co., of Indianapolis, appointed the appellees agents in the town of Arcadia and vicinity, to sell the Eagle Straw Stacker, of which they were the manufacturers. The appointment was by an instrument in writing, which, besides a great many other stipulations, contained the following:

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"*Fifth.* To deliver no stackers to any party until settled for as herein provided, agreeing, as a penalty for any violation of this article, to become personally responsible for the same, waiving all claim under warranty on said machinery and insuring settlement for same under terms of contract."

It was also stipulated in the contract that no machines should be sold by the agents, except upon a written order which the purchaser should be required to sign, in which were to be stated the terms of sale and manner of settlement, and a stipulation that the title to the property sold should remain in the seller until paid for.

This suit was brought by the principals against the agents, alleging in the first paragraph of the complaint that they had sold and delivered a stacker to one Hankley without taking from him an order as provided in their contract, and without requiring him to settle as their agreement required. It was further alleged that Hankley had wholly failed to pay for the stacker, whereby it was claimed that appellees had become liable for the price of the stacker.

There was a second paragraph of complaint, a common count, for the price of a stacker sold and delivered by plaintiffs to defendants at their request.

Issues were made and a trial had by a jury; the jury returned a special verdict, in substance, that the plaintiffs delivered the stacker to the defendants to be sold under their contract of agency, as set out in the complaint; that the defendants had not sold it to any one, but that they had permitted one Hankley to take it on trial, under an agreement that if it worked satisfactorily he was to purchase it on the terms prescribed in the written orders, at the price of \$215; that Hankley returned the stacker, claiming that it failed to work properly, and refused to purchase; that another agent of plaintiffs then took charge of and stored it in the town of Arcadia. The plaintiffs moved for judgment on the special verdict, which was overruled, and judgment was rendered for the defendants.

It will be observed that the gravamen of the first paragraph of the complaint is, that the appellees sold and delivered the stacker to Hankley in violation of their agreement, without requiring him to sign the order prescribed, and without requiring him to settle for it before it was delivered. There was no evidence tending to support the second paragraph of complaint, and the special finding does not support either.

The plaintiffs must recover, if at all, upon the case as made in their complaint, and not on some other which they might have made. *Thomas v. Dale*, 86 Ind. 435.

The special finding, which is sustained by the evidence, shows that there was no sale of the stacker, and that the delivery to Hankley was not in pursuance of such a contract of sale as, within the stipulation above set out, was to result in making the agents liable for the price if the article was delivered without first requiring settlement. It was delivered to him on trial with a view to a future sale, provided it worked satisfactorily. This may have been, as the appellants claim, a conditional sale and a violation of the agents' contract, but if it was, it was not the violation complained of and for which the suit was brought, and unless it can be held that a suit may be brought for one breach of a contract, and the recovery had for an entirely different one, no recovery can be had in this case. That this can not be done is not an open question. *Boardman v. Griffin*, 52 Ind. 101. Under the stipulation referred to, the agents became responsible for the contract price of every stacker which they might sell and deliver without first requiring settlement therefor.

The delivery which is provided against is a delivery without first requiring settlement for the price agreed upon in pursuance of a contract of sale, and it was for a delivery in violation of this provision that the complaint counted on.

If the agents, without authority, made an arrangement looking to a future sale, and thereunder permitted the stacker to be used by another, who refused to complete the contract, and injury resulted to the principal from such unauthorized

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conduct, the actual damage sustained might doubtless be recovered in a proper action for that purpose, but that is not this case. The complaint counted upon a cause of action which was argumentatively denied in the defendants' answer. The special verdict finds the defendants' theory substantially and is silent as to the issues tendered by plaintiffs. There was no ground for a *venire de novo*.

Judgment affirmed, with costs.

Filed May 13, 1885; petition for a rehearing overruled June 18, 1885.

No. 12,126.

FAHNESTOCK v. THE STATE.

CRIMINAL LAW.—*"Pimp."*—*Indictment.*—*Duplicity.*—An indictment under section 2002, R. S. 1881, charged that one F., on, etc., did unlawfully frequent houses of ill fame, well knowing them to be such, and did unlawfully frequent houses of assignation, well knowing them to be such, and did unlawfully associate with females known and reputed as prostitutes, viz., with one K. and others whose names are to the grand jury unknown, well knowing them to be such, and was then and there engaged in and about a house of prostitution, he, the said F., then and there being a male person, contrary, etc. On motion to quash, *Held*, that the indictment is not bad for duplicity.

SAME.—*House of Prostitution.*—*Question of Fact.*—In a prosecution under such an indictment, the question as to whether or not the house, which the defendant is alleged to have unlawfully frequented, and in and about which he was engaged, was a house of ill fame, assignation or prostitution, in so far as it is of importance in such case, is a question of fact for the jury, to be determined from the evidence.

SAME.—*Instruction to Jury.*—*Prostitute.*—*Statute.*—In such case an instruction to the jury, that "A female prostitute is a woman who has or holds unlawful sexual intercourse with men; and any act of voluntary sexual intercourse, between an unmarried female and a male person, is whoredom; and a single act of that kind makes a woman a whore or prostitute, these two terms meaning the same thing. And the association of a male person, not her husband, with such a woman, constitutes him a pimp," is erroneous, for the reason that section 2003, R. S. 1881, defines the meaning of the term "prostitute," and the definition given in such instruction is not in harmony with that given in said section.

109	157
137	409
102	157
128	160

102	156
133	406

102	156
148	222

102	156
154	428

102	156
169	267
170	539

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STATUTE.—Definition of Words.—Where a statute defines words or terms used therein, no wider or different meaning can be given them by any rule of legal construction.

From the Randolph Circuit Court.

E. L. Watson, J. S. Engle, W. A. Thompson and J. W. Thompson, for appellant.

F. T. Hord, Attorney General, and *W. B. Hord*, for the State.

HOWK, J.—The first error of which the appellant complains in this case is the overruling of his motion to quash the indictment.

It was charged in the indictment, that James Fahnestock, late of Randolph county, Indiana, "on the 1st day of September, 1884, at said county and State aforesaid, did then and there unlawfully frequent houses of ill fame, well knowing them to be such, and did then and there unlawfully frequent houses of assignation, well knowing them to be such, and did then and there unlawfully associate with females known and reputed as prostitutes, to wit, with one Hattie Knecht and others whose names are to the grand jury unknown, well knowing them to be such, and was then and there unlawfully engaged in and about a house of prostitution, the said James Fahnestock then and there being a male person, contrary to the form of the statute," etc.

The only objection urged to the indictment by appellant's counsel is that it is bad for duplicity. It is manifest upon the face of the indictment that it was intended to charge the appellant therein with the offence against public morals of being a pimp. This offence is defined, and its punishment prescribed, in section 2002, R. S. 1881, which reads as follows: "Whoever, being a male person, frequents houses of ill fame or of assignation, or associates with females known or reputed as prostitutes, or frequents gambling houses with prostitutes, or is engaged in or about a house of prostitution, is a pimp, and, upon conviction thereof, shall be fined in any sum not

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more than one hundred dollars nor less than ten dollars, and imprisoned in the county jail not more than sixty days nor less than ten days."

It is claimed on behalf of the appellant that the indictment against him in this case, the substance of which we have quoted, is bad for duplicity, because it charges him in a single count with having committed on the same day and at the same place four separate acts, either one of which acts, if sustained by the evidence, would have been sufficient to show that, under the statute, he was guilty of the offence against public morals of being a "pimp." If the indictment had charged him with the commission of only one of these acts, it would have charged him with the offence of being a pimp, and nothing less; and when it charged him, as it did, with the commission of the four acts at the same time and place, it charged him only with the single offence of being a pimp, and nothing more. It can not be held that an indictment, which charges the defendant with only one offence as the same is defined in the statute, is bad for duplicity merely because it charges him with the commission of several distinct acts at the same time and place, either one of which acts would be sufficient alone to constitute a proper charge of such offence. Where a statute, like section 2002, above quoted, makes it an offence to do this, or that, or another thing, mentioning several things disjunctively, either one of which would constitute one and the same offence, subject to one and the same punishment, it is the general rule that all the things mentioned in the statute may be charged conjunctively in a single count, as constituting but a single offence. In such a case the indictment is not open to the charge of duplicity, because there can be but one conviction and one punishment for one offence. *State v. Bielby*, 21 Wis. 206; *Clifford v. State*, 29 Wis. 327.

This general rule in criminal pleading was recently approved and acted upon by this court in the well considered case of *Davis v. State*, 100 Ind. 154. Applying this rule to

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the case in hand, we have no difficulty in reaching the conclusion that the indictment against the appellant is not bad for duplicity, and that his motion to quash it was correctly overruled.

Under the alleged error of the court in overruling the appellant's motion for a new trial, it is claimed by his counsel that two important legal questions are presented for decision in this case, by the instructions given by the court and by the refusal of the court to give certain other instructions at his request. These two questions are thus stated by his counsel: "1. Under our statutes, what does it take to constitute a house a house of prostitution or ill fame?" and, "2. Under the same statutes, what does it take to constitute a woman a prostitute?"

In their discussion of the first of these two questions, the appellant's counsel earnestly insist that the trial court erred in its refusal to give the jury each and all of the following instructions, as requested by appellant, namely:

"1. If one woman live in and occupy a house, and no other woman or women live in or occupy said house with her, and the woman, who so occupies said house, occasionally or frequently, admits one man, the same man, to said house for the purpose of, and does have, illicit sexual intercourse with him, such acts and conduct would not make said house a house of prostitution or ill fame.

"2. If one woman live in and occupy a house, and no other woman or women live in or occupy said house with her, and the woman who so occupies or lives in said house alone, occasionally, or frequently, admits one and the same man, or many men, for the purpose of, and does have, illicit sexual intercourse with such man or men so admitted to said house, such acts and conduct do not constitute said house a house of prostitution or ill fame.

"4. A house of prostitution or ill fame is a house where prostitutes and lewd persons live, or where such prostitutes and lewd persons visit, and which is kept for the reception

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of persons who choose to resort to it for the purpose of illicit sexual intercourse.

"5. A house of prostitution or ill fame is a house or place where prostitutes and lewd persons resort, and which is kept for the reception of persons who choose to resort to it for the purpose of illicit sexual intercourse; and if a house is kept by one woman, in order to make it a house of prostitution, it must be resorted to in common by other lewd women besides the keeper of the same.

"7. The character of a house of ill fame or prostitution is determined by the character of the persons who resort to or visit and live therein; and in order to make said house of Hattie Knecht a house of ill fame or prostitution, it must have been shown by the State that prostitutes and lewd persons of both sexes resort to or live in said house."

In the same connection, the appellant's counsel further insist that the trial court erred in giving the jury, of its own motion, the following instruction:

"5. If one woman who is a prostitute lives in and occupies a house, and admits to it frequently one and the same man, not her husband, for the purpose of, and such man and such woman do at such meetings have, illicit sexual intercourse, such conduct would make and constitute such house a house of assignation, or prostitution, or ill fame; those terms meaning one and the same thing."

The court committed no error, as it seems to us, in refusing to give the jury either of the above instructions requested by appellant. The question as to whether or not the house of Hattie Knecht was a house of ill-fame or of assignation, or a house of prostitution, in so far as it has any importance in this case, was a question of fact, rather than of law, to be determined by the jury from the evidence in the cause. It is not true, as matter of law, under the statute of this State, that a house may not be a house of ill fame, or of assignation, or of prostitution, unless it be shown to be occupied by more than one prostitute, or to be resorted to by other prosti-

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tutes and more than one man, for the purposes of prostitution. Nor did the court materially err, we think, in giving the jury, of its own motion, instruction five last above quoted, although it may be open to criticism. It is true, perhaps, that where one prostitute alone lives in and occupies a house, but frequently admits thereto one man only, not her husband, for the purpose of illicit sexual intercourse, and they there have such sexual intercourse, such house may be in fact a house of ill fame, or of assignation, or of prostitution, within the meaning of the statute. But this is true, as it seems to us, as a fact rather than as matter of law. While we are not willing to reverse the judgment below, on account of error in the court's fifth instruction above quoted, we may properly say that it borders closely upon, if it does not invade, the province of the jury.

We pass to the consideration of the second question, which appellant's counsel claim is presented for decision in this case by an instruction given by the court of its own motion, and by its refusal to give the jury another instruction at appellant's request. The question is thus stated: Under the statutes of this State, what does it require to constitute a woman a prostitute? Upon this question, the court gave the jury the following instruction:

"A female prostitute is a woman who has or holds unlawful sexual intercourse with men; and any act of voluntary sexual intercourse, between an unmarried female and a male person, is whoredom; and a single act of that kind makes a woman a whore or prostitute, these two terms meaning the same thing. And the association of a male person, not her husband, with such a woman, constitutes him a pimp."

Upon the same question, the appellant requested and the court refused to give the following instruction:

"If one woman live in and occupy a house, and no other woman or women live in or occupy such house with her, and the woman, who so occupies such house, occasionally or fre-

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quently admits one and the same man to such house for the purpose of, and does have, illicit sexual intercourse with such man, such acts and conduct would not make such woman a prostitute, unless such acts of illicit sexual intercourse were done for hire."

We are of opinion that the trial court clearly erred in instructing the jury, as it did, that a single act of voluntary sexual intercourse, between an unmarried woman and a male person, makes the woman a prostitute, within the meaning of the criminal laws of this State. In section 2003, R. S. 1881, in the statute of this State defining public offences, it is provided as follows: "Any female who frequents or lives in houses of ill fame, or associates with women of bad character for chastity, either in public or at a house which men of bad character frequent or visit; or who commits fornication for hire,—shall be deemed a prostitute," etc. This is the statutory definition of the term "prostitute"; and wherever the term is used in the criminal laws of this State, it must be held that it is used as here defined, unless the context clearly shows that the Legislature intend to give it a broader or different meaning. This definition immediately follows the section of the statute under which the appellant is indicted in this case; and it is fair to assume that the term "prostitute" is used in that section as it is defined in the next succeeding section. It is manifest that the court's charge, in relation to what will make a woman a prostitute, is entirely outside of the statutory definition of the term "prostitute."

In *Osborn v. State*, 52 Ind. 526, this court held, in effect, that the phrase "illicit sexual intercourse," and the word "prostitution," were not convertible terms. In that case *Osborn* was indicted under a section of the statute which made it a felony for any person to entice or take away any female, of previous chaste character, "for the purpose of prostitution." The indictment charged that *Osborn* enticed away a certain female, of previously chaste character, "for the purpose of having illicit sexual intercourse with her." He was tried and

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convicted below, and upon appeal the question arose here whether the facts charged made a case within the statute, and it was held that they did not. The court cited with approval, and based its decision upon, the following authorities: *Commonwealth v. Cook*, 12 Met. (Mass.) 93; *Carpenter v. People*, 8 Barb. 603; *State v. Ruhl*, 8 Iowa, 447; *State v. Stoyell*, 54 Maine, 24. In each of the cases cited it is substantially held that the word "prostitution," as used in the criminal statutes of the several States, means common, indiscriminate, meretricious, illicit intercourse, and not sexual intercourse confined exclusively to one man. This meaning of the word "prostitution" is in harmony with the statutory definition of the word "prostitute," as given in section 2003, R. S. 1881, but it is in direct conflict with the meaning placed upon the latter word in the court's instruction above quoted.

We are aware that the court's instruction we are now considering is copied almost literally from the language of this court in *Rodebaugh v. Hollingsworth*, 6 Ind. 339. The case cited was brought by a woman to recover damages for alleged slanderous words, spoken of and imputing to her a want of chastity. The court there said: "Any act of sexual intercourse between a married female and a male person not her husband, or between an unmarried female and a male person, is whoredom, and a single act of the kind, according to the case of *Alcorn v. Hooker*, 7 Blackf. 58, makes a woman a whore." Without approving or condemning the cases last cited, or the language last quoted, it will suffice for us to say that those cases were civil actions, wherein the plaintiffs sought to solace their wounded pride, and to repair their damaged reputations, by the recovery merely of money, and, further, that at the time those decisions were made, we had in this State no statutory definition of the words "whore" or "prostitute." The case in hand is a criminal prosecution, for an offence against public morals, wherein the defendant, if found guilty, may be subjected to a heavy fine and a degrading imprisonment. Of course, the language and terms of a criminal

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statute must be rigidly and strictly construed ; and, certainly, where the statute itself defines words or terms used therein, no wider or different meaning can be given such words or terms by any rule of legal construction.

We conclude, therefore, as we began, our consideration of the second question propounded by appellant's counsel, in their argument of this cause, with the statement that in our opinion the court's instruction, last above quoted, is not the law of this State in criminal prosecutions such as the one at bar. This conclusion, however, does not involve an approval of the instruction requested by appellant on the same subject and last above quoted. It is not necessary to the decision of this cause, as now presented, that we should now determine the question, as to whether or not there was error in the court's refusal to give the instruction as requested ; therefore we do not decide this question, and we deem it not improper for us to say that we neither approve nor condemn such instruction.

Other questions are presented and discussed by appellant's counsel in their able and exhaustive brief of this cause ; but as the judgment below must be reversed and a new trial awarded for the error of the court already pointed out in its instruction last above quoted, we need not extend this opinion in the consideration and decision of such other questions ; especially so as those questions may not arise again upon the new trial of this cause.

The judgment is reversed, and the cause is remanded, with instructions to sustain the motion for a new trial, and for further proceedings not inconsistent with this opinion.

Filed May 26, 1885.

No. 11,310.

JOHNSON v. MULLINIX ET AL.

DRAINAGE.—*Act of April 21st, 1881.—Appeal.—Practice.*—In a proceeding for the establishment of a drain before the board of commissioners under the act of April 21st, 1881, an appeal from the judgment of the board,

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taken by either party to the circuit court, is governed by the provisions of sections 17 and 18 of that act, and not by the general statute governing appeals from the decisions of boards of commissioners, and no notice of any such appeal need be given the adverse party, either by summons or otherwise.

From the Steuben Circuit Court.

G. B. Adams, R. Lowry and F. T. Hord, for appellant.

D. R. Best, for appellees.

ELLIOTT, J.—The appellees commenced this proceeding by filing a petition for the establishment of a ditch under the act of April 21st, 1881. The board of commissioners found against the petitioners and rendered judgment in favor of the appellant who was a remonstrant. Within thirty days from the time the judgment of the commissioners was announced, the appellees filed an appeal bond and asked an appeal to the circuit court. The appellant did not appear in the case in the circuit court, and judgment was rendered upon default. From that judgment he prosecutes this appeal, insisting that it is erroneous because there was no summons issued and served upon him.

We think that the act of 1881 makes special provisions for appeals, and that appeals are governed by those provisions, and not by the general statute governing appeals from decisions of the board of commissioners. Acts 1881, p. 416, sections 17 and 18. This act does not, as is evident from its language, require that any summons shall be issued, and no good purpose can be subserved by causing the issuing and service of summons in cases where one of the parties takes the appeal; on the contrary, such a course would add greatly to the expense of the proceedings and cause needless delay. It is reasonable to require parties to take notice of the provision giving thirty days in which to appeal and to ascertain whether the party having the right prescribed by statute has exercised it. This rule obtains in analogous cases, and there is no reason why it should not apply here.

Judgment affirmed.

Filed June 11, 1885.

Conduitt v. Ross.

No. 11,760.

CONDUITT v. ROSS.

PARTY WALL.—*Covenant Running with Land.*—*Case Distinguished.*—A. and B. being owners of adjoining city lots, the former in erecting a building on his lot placed one-half the width of a side wall thereof on B.'s lot, pursuant to a written agreement of said parties, whereby, in consideration that A. should erect such a wall, B. bound himself, his heirs, executors, administrators and assigns, that whenever B., his heirs, executors, administrators or assigns, in any building he or they might erect on said lot so owned by B., should use said wall, or any part thereof, or attach any part of his or their building thereto, A. should be paid the full value of one-half of the original cost of said wall, and that B., his heirs, executors, administrators or assigns, should not use or attach to said wall until said value and cost should be ascertained and paid or tendered to A. After the erection of said building A. conveyed his said lot, with the improvements thereon, to C., reserving the right to receive compensation from adjoining property owners for the building or use of existing party walls. Afterwards D. became the owner of B.'s said lot, having purchased it with notice of said agreement, and erected a building thereon, and attached it to and used said wall.

Held, that B.'s covenant to pay ran with his said land, while the right to receive payment was personal to A.

Held, also, in an action brought on said contract by A. against D., that the latter was liable to the former for one-half of the original cost of the party wall, though, by reason of injury from fire, it was worth less than its original cost. *Bloch v. Isham*, 28 Ind. 37, distinguished.

From the Marion Superior Court.

T. A. Hendricks, C. Baker, O. B. Hord, A. W. Hendricks, A. Baker, E. Daniels and W. S. Shirley, for appellant.

J. M. Judah and O. B. Jameson, for appellee.

MITCHELL, J.—On the 26th day of April, 1875, Julia A. Ross and John Hauck were the owners of adjoining lots in the city of Indianapolis. Pursuant to a written agreement entered into by Mrs. Ross and her husband on the one part, and Mr. Hauck on the other, she placed one-half the width of the south wall of a four-story brick and stone building which she erected on her lot, on the north margin of the Hauck lot. After erecting the building, she conveyed the

103	166
125	33
126	377
109	166
126	388

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lot, with the improvements thereon, to George P. Bissell, reserving by a stipulation contained in her deed, the right to receive compensation from adjoining property owners for the building, or use of existing party walls. Subsequently the appellant became the owner of the Hauck lot, and in 1882 commenced the erection of a building thereon, and attached the same to and used the wall erected by Mrs. Ross. Refusing to make payment, this suit was commenced to recover one-half the original cost of the wall. Upon issues made a trial was had, which resulted in a finding and judgment for the plaintiff.

Counsel for appellant rest their argument for a reversal of this judgment mainly upon the proposition that the agreement between Hauck and Mrs. Ross was purely personal to them, and that Conduitt, by using the wall erected in pursuance thereof, came under no obligation whatever in consequence of such use. They insist further, that, if liable at all, the extent of his liability was the actual value of the wall when used, and not its original cost.

The rights and obligations of the parties must be determined by a construction of the agreement already referred to, which is of the following tenor:

"This agreement between John Hauck of the first part, and Julia A. Ross and Norman M. Ross, her husband, of the second part, witnesseth: That in consideration that the parties of the second part shall erect a substantial brick wall, twelve inches in thickness and four stories high, on the line dividing the property of John Hauck and Julia A. Ross, in square 87, in the city of Indianapolis, Marion county, Indiana, which line is twelve feet south of the south line of lot No. 4, in Morris Morris' subdivision of square 87, in the city of Indianapolis, and which wall is to stand six inches in width upon the ground of said Hauck, and six inches upon the ground of said Ross, and is to run back the depth of said Ross's present building, and may at any time be extended further back on the same line the full depth of said

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lots by either party, the full consent of said Hauck to the erection of said walls being hereby granted: Now, therefore, said John Hauck hereby binds himself, his heirs, executors, administrators and assigns, that whenever, after the erection of said wall or walls by the party of the second part, said Hauck, his heirs, executors, administrators or assigns, shall, in any building he or they may erect on the present ground of said Hauck, use said wall or any part thereof, or attach any part of his or their building thereto, then the said Julia A. Ross shall be paid, without relief from valuation or appraisement laws, the full value of one-half the original cost of said wall or walls. And it is further agreed that neither party shall have the right to so use any part of said wall or walls as to weaken or endanger the same; and that said Hauck, his heirs, executors, administrators or assigns shall not in any wise whatever use or attach to said wall or walls so to be erected by said Ross, until the said value and cost of one-half thereof shall be ascertained, and paid or tendered to said Julia A. Ross.

"In witness whereof, we have hereunto set our hands and seals, this 26th day of April, 1875.

"(Signed)

JOHN HAUCK. [SEAL.]

"JULIA A. ROSS. [SEAL.]

"N. M. ROSS. [SEAL.]"

This agreement was duly acknowledged and recorded in the miscellaneous records of Marion county, and it is averred that the appellant had actual notice of it at the time he purchased.

The liability of the appellant depends upon whether the contract set out constituted a continuing covenant, which became annexed to and ran with the Hauck lot. If it did, he is liable according to its terms; if it did not, he is liable in this form of action for nothing.

In considering whether a covenant is one which does, or does not, run with land, there is always embraced the following inquiries: 1. Is the covenant one which, under any cir-

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cumstances, may run with land? 2. Was it the intention of the parties, as expressed in the agreement, that it should so run?

Doubtless, a covenant which, from its character, might run with the land, may be so restricted in terms as to make it purely personal, and available to the parties to it, and no other. So, too, a covenant may contain apt words to make it a continuing covenant; yet, if its nature or the subject-matter of it is such that it does not concern some interest or estate in land, either existing or created by it, it can not run with land.

When an instrument conveys or grants an interest or right in land, and at the same time contains a covenant in which a right attached to the estate or interest granted is reserved, or when the grantee covenants that he will do some act on the estate, or interest granted, which will be beneficial to the grantor, either as respects his remaining interest in the lands out of which an interest is granted, or lands adjacent thereto, such covenant is one which may become annexed to and run with the land, and bind its owners successively. When such grant is made, and contains a covenant so expressed as to show that it was reasonably the intent that it should be continuing, it will be construed as a covenant running with the land. • A covenant which may run with the land must have relation to the interest or estate granted, and the act to be done must concern the interest created or conveyed.

In *Bally v. Wells*, 3 Wils. 25, it was said: "When the thing to be done, or omitted to be done, concerns the lands or estate, that is the *medium* which creates the privity between the plaintiff and defendant."

By the contract under consideration, Mrs. Ross acquired the right to enter upon the Hauck lot and erect and permanently maintain thereon a party wall. This was a grant to her of an interest in land, and was of such a character that a perpetual covenant might be annexed to it. *Snowden v.*

Wilas, 19 Ind. 10; *Hazlett v. Sinclair*, 76 Ind. 488 (40 Am. R. 254); 1 Smith Leading Cases, 8th ed., 161, 162.

In consideration of this grant to her she covenanted to do an act beneficial to the remaining interest of Hauck; that act was the erection of a wall so situated as that one-half of it should rest on the margin of his lot, and the other half on hers, thus devoting each estate to the mutual support of the party wall. She at the same time covenanted that when she should be reimbursed one-half the cost of the wall, he, or his grantees, should acquire a reciprocal interest in her lot, and in legal effect become owner of one-half the party wall.

This agreement created what has been aptly termed mutual or cross easements in favor of each in the lot of the other, and was an arrangement mutually beneficial to both properties. *Fitch v. Johnson*, 104 Ill. 111; *Roche v. Ullman*, 104 Ill. 11; *Bronson v. Coffin*, 108 Mass. 175 (11 Am. R. 335); *Thomson v. Curtis*, 28 Iowa, 229.

It contained, therefore, all the elements necessary to a covenant capable of running with the land. *Hazlett v. Sinclair*, *supra*; *Richardson v. Tobey*, 121 Mass. 457 (23 Am. R. 283); *Standish v. Lawrence*, 111 Mass. 111; *Maine v. Cumston*, 98 Mass. 317; *Savage v. Mason*, 3 Cush. 500; *Brown v. McKee*, 57 N. Y. 684; *Keteltas v. Penfold*, 4 E. D. Smith, 122; *Platt v. Eggleston*, 20 Ohio St. 414; *Masury v. Southworth*, 9 Ohio St. 340; *Bertram v. Curtis*, 31 Iowa, 46; *Norfleet v. Cromwell*, 70 N. C. 634, 641 (16 Am. R. 787).

It is apparent, too, that it was the intention of the parties that the covenant to pay should run with the land. The words used in that connection are those usually and aptly employed for the purpose: "John Hauck hereby binds himself, his heirs, executors, administrators and assigns, that whenever, after the erection of said wall or walls by the party of the second part, said Hauck, his heirs, executors, administrators or assigns, shall, in any building he or they may erect," etc., they will pay, etc. A continuing covenant may exist without the word "assigns," or "grantees," but when

Conduitt v. Ross.

these or equivalent words are used, they become persuasive of the intent of the parties. *Van Rensselaer v. Hays*, 19 N. Y. 68. It was the manifest purpose of the parties that the right to receive payment for the wall should be personal to Mrs. Ross. It was stipulated that payment should be made to Julia A. Ross.

It results that the complaint was sufficient, and that the second paragraph of answer, in which it was alleged that the wall, by reason of injuries sustained from fire, was worth much less than the original cost, was insufficient, and the respective rulings of the court were not erroneous.

The covenant being one which ran with the land, when the appellant availed himself of its benefits he became related to it as the original covenantor, and it became the measure of his obligation. We think it is fairly deducible from the complaint that the appellant derived his title through Hauck.

Judgment affirmed, with costs.

Filed April 21, 1885.

ON PETITION FOR A REHEARING.

MITCHELL, C. J.—The learned counsel for appellant, in support of their petition for a rehearing, suggest that it was decided in *Bloch v. Isham*, 28 Ind. 37, *Taylor v. Owen*, 2 Blackf. 301, and *Hazlett v. Sinclair*, 76 Ind. 488, that an instrument of the character in question here does not convey or grant an interest in land. We entertain a different view of the cases mentioned. *Bloch v. Isham*, *supra*, was a suit by the grantee of the first builder, to recover from the second builder one-half the cost of a party wall, and it was held there, as we hold here, that the right to receive payment for the wall was personal to the first builder. It is true it was said in that case that it turned “upon the solution of the question as to whether Isham’s agreement to pay for one-half of the party wall is a covenant running with the land.” Under the Iowa statute it was held, in the cases cited in the principal opinion, that an easement is created, and that both the

obligation to pay and the right to receive payment run with the land.

We think the covenant to pay might well run with the land, while the right to receive payment might, as it was held in *Bloch v. Isham, supra*, be personal to the first builder. This must depend upon the contract, in the absence of statutory regulation. It was said in that case, that the agreement there under consideration embraced, substantially, the provisions of the Pennsylvania statute. Under the statute of that State, the second builder is always held liable to pay the first builder, which, we think, is the result of the agreement in this case. So far as *Bloch v. Isham, supra*, holds that the agreement was personal to the first builder, and did not enure to the benefit of his grantee, which was the only question before the court, we are strictly in accord with it. What was said beyond that must be regarded as having resulted from the distinction which is to be made between the agreement there under review and that which we are considering. The covenant, as it is there recited by the court, is: "Schenck and Isham * * entered into a written agreement, whereby Schenck acquired the right to build one of the walls of a brick store, then in process of erection on his own lot, with one-half of its thickness resting on the lot of Isham; and Isham acquired for himself, his heirs or assigns, the right to use said wall by joining a building thereon, and agreed for himself and them to pay one-half of the original cost of said wall, when he or they should use the same."

In effect, Isham personally agreed for himself and his grantees to pay when he or they should use the wall. In the case before us Hauck made no such agreement. It may be said moreover, that the case of *Weld v. Nichols*, 17 Pick. 538, which is regarded as conclusive of the question there involved, will be found to have a very remote, if any, bearing on the question we are considering under this agreement.

We have said this much to indicate that so far as the point involved in *Bloch v. Isham, supra*, was concerned, we are in

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accord with it, and beyond that it must be considered as distinguished by the character of the agreement.

As to *Taylor v. Owen*, *supra*, the principles involved are essentially different, and for support of the proposition that a continuing covenant may be annexed to an easement in land, and that there is in consequence such privity of estate as makes the appellant liable on the covenant, we need go no farther than *Hazlett v. Sinolair*, *supra*.

The petition for a rehearing is overruled.

Filed June 13, 1885.

No. 11,964.

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PARTITION.—*Title.*—Ordinarily, in a suit for partition, the title to the land is not in issue; but title may be put in issue in such a suit by appropriate pleadings, and when thus put in issue the decree is conclusive on that question.

SAME.—*Pleading.*—Under the statute, where the complaint in a suit for partition by proper averments tenders an issue as to the title to the land, an answer of general denial admits all defences; but when the complaint does not tender such issue, the general denial does not have such effect, and, in such case, in order that the question of title may be involved, it must be presented by an affirmative pleading on the part of the defendant.

PRACTICE.—*Demurrer.*—*Harmless Error.*—There is no available error in sustaining a demurrer to a paragraph of pleading, if the party pleading such paragraph has in any other form the full benefit of the matters therein pleaded.

HUSBAND AND WIFE.—*Wife's Deed.*—*Tenant by the Curtesy.*—*Statute of Limitations.*—In 1847 land was conveyed to a married woman by a deed giving her an estate of inheritance, without any express and clear restriction of the rights of her husband, and she and her husband took possession. In 1850 she alone executed a voluntary deed, recorded in 1866, purporting to convey the land to her said husband, and he remained in possession, claiming ownership, till she died intestate, in 1869, leaving surviving her said husband and a number of children, his issue by her. Said husband continued in possession of the land until, in 1873, he sold and by warranty deed conveyed it for value to a stranger, who

108	173
125	115
125	187
126	329
127	37
127	498
102	173
123	157
102	173
126	426
102	173
139	118
102	173
140	543
102	173
146	9
102	173
148	393
148	395
150	485
102	173
159	379
102	173
161	447
102	173
167	48

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thereupon took possession and paid the purchase-money to said husband and father, who died in 1875, leaving said children surviving.

Held, that said deed of the wife to the husband conveyed no interest, but was void.

Held, also, that the husband was a tenant by the curtesy, and the right of action of said children for partition and the recovery of their interests in the land as the heirs of their mother did not accrue, and the statute did not begin to run against them, until the death of their father.

From the Allen Superior Court.

J. Morris, C. H. Aldrich and J. M. Barrett, for appellant.

H. Colerick and W. S. Oppenheim, for appellees.

ELLIOTT, J.—It is alleged in the complaint of the appellees, who were the plaintiffs below, that Ann Helen Greve died intestate, the owner of real estate, of which a specific description is given, leaving her surviving, her husband, Francis Greve, and her children, the appellees; that, on the 21st day of April, 1873, Francis Greve conveyed all of his interest in the land to the defendant; that by the death of Ann Helen Greve the appellees were seized as tenants in common of one-ninth of said land in fee.

This complaint, it will be observed, is an ordinary complaint for partition, and does not, by any averment, put the title in issue. It simply pleads enough upon the subject of title to give the appellees a *prima facie* right to partition, and this was all it was incumbent upon the parties to do in order to make a case entitling them to the relief prayed. The relief sought is, not the establishment or quieting of title, but merely partition of the land. Ordinarily, the title to the land is not in issue in a suit for partition. Neither the object of the suit, nor the effect of the decree, is to establish or quiet title, but simply to make division of the land. *Fleenor v. Driskill*, 97 Ind. 27; *Kenney v. Phillipy*, 91 Ind. 511; *Miller v. Noble*, 86 Ind. 527; *Utterback v. Terhune*, 75 Ind. 363; *Avery v. Akins*, 74 Ind. 283; *Teter v. Clayton*, 71 Ind. 237. Title may be put in issue by appropriate pleadings, and, when thus put in issue, the decree is as conclusive as in any other

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action. *Fleenor v. Driskill*, *supra*; *Kenney v. Phillipy*, *supra*; *Cooter v. Baston*, 89 Ind. 185; *Ferris v. Reed*, 87 Ind. 123; *Miller v. Noble*, *supra*; *McMahan v. Newcomer*, 82 Ind. 565; *Cravens v. Kitts*, 64 Ind. 581; *Milligan v. Poole*, 35 Ind. 64; *Godfrey v. Godfrey*, 17 Ind. 6. In the present case, the complaint seeks partition only, makes only such averments as are necessary to procure partition, and tenders no issue requiring the quieting or establishment of title.

The code provides that the rules prescribed in actions to recover possession or to quiet title are extended, so far as they are applicable, to partition cases "when the title to real estate is *bona fide* in question, upon the pleadings and evidence between the parties" (R. S. 1881, section 1071), and the question which first arises is as to what cases this statutory rule applies. Where the complaint by proper averments puts the title in issue, then the general denial admits all defences, but when the complaint does not tender that issue, the general denial can not have that effect. If the complaint does not, by proper averments, present that issue, it must be done by some affirmative pleading on the part of the defendant, or it can not be truly said to be in issue "on the pleadings." Without pleadings putting the title in issue, it is inconceivable that it can be in issue "on the pleadings," and it is only where it is thus in issue that the general denial admits all special defences. If the plaintiff desires to put it in issue, he must do so by appropriate averments in his complaint; otherwise he can not insist that the general denial embraces special defences. If the plaintiff does not elect to put the title in issue and the defendant does, it is then not only proper but necessary to plead it specially by way of answer or counter-claim. If the defendant desires an adjudication upon the question of title, he must plead facts tendering that issue, for, if he contents himself with a mere denial, he does no more than controvert the plaintiff's right to partition, and, in that event, the only matter conclusively adjudicated is the right to a division of the land. We are of the opinion that

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the appellee is wrong in asserting that the second paragraph of the answer, which pleads title by estoppel, is embraced by the general denial.

The matters contained in the second paragraph of the answer are, however, pleaded by way of counter-claim, and this gave the appellant the full benefit of them, and there was, therefore, no available error in sustaining the demurrer to the answer. We suppose it to be immaterial what name is given a pleading, provided it be of such a character as to secure the party the full benefit of the matters pleaded in another form.

The third paragraph of the answer and the third paragraph of the counter-claim are substantially the same, and, for the reason just given in disposing of the demurrer to the second paragraph of the answer, we hold that no available error was committed in sustaining the demurrer to the third paragraph of that pleading.

The facts stated in the special finding are substantially these: On the 26th day of June, 1847, John B. Voors, then the owner of the land, conveyed it to his daughter, Ann H. Greve. The *habendum* clause of the deed reads thus: "To have and to hold the above described premises hereby sold and conveyed unto the said party of the second part, her heirs and assigns forever, together with all the appurtenances thereunto belonging, and rents, profits and reversions of the same, to her own proper use, benefit and behoof." Soon after the execution of this deed, Ann H. Greve and her husband, Francis Greve, took possession of the land. About a year after Voors conveyed the land to her, she and her husband executed a mortgage conveying the land to Bernard Joseph Voors and Mary Voors to secure a debt of \$350; the note evidencing the debt was executed in part payment for the land, "and to equalize the division of property made by John B. Voors among his children." This note was afterwards paid by Francis Greve, and the mortgage was satisfied in 1861. In April, 1850, Ann H. Greve executed a deed in the usual form, pur-

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porting to convey the land to her husband, Francis Greve. After the execution of this deed Ann H. Greve and her husband, being then in possession of the land, made lasting and valuable improvements, of the value of twelve hundred dollars. From the time of the execution of the deed to him Francis Greve remained in possession, claiming to be the owner of the land, asserting adverse possession thereof, and so remained in possession until the death of his wife, who died intestate in 1869. Ann H. Greve left surviving her the following named children: Joseph Greve, then twenty-one years of age, John H. Greve, then nineteen years of age, Matilda Greve, now Matilda Armstrong, then seventeen years of age, Clara Greve, now Clara Hemphkin, then fourteen years of age, Catherine Greve, then ten years of age, Mary Greve, then aged seven years, and Emma Greve, then aged four years. Catherine Greve survived her father and died without issue in 1875. The husband, Francis Greve, remained in possession of the land after the death of his wife until he sold it. On the 15th day of April, 1868, he and his wife mortgaged the land to Bernard Sehler, to secure a debt of one thousand dollars, which debt and mortgage were assigned to John Laurent in November, 1871. In March, 1870, Francis Greve executed a mortgage, to secure one thousand dollars, to John Laurent, and in October, 1871, executed a mortgage to him for three thousand dollars, and in this sum the two prior mortgages of one thousand dollars each were included. On the 21st day of April, 1873, Francis Greve sold and conveyed the land by warranty deed to John Luntz for \$6,300; the purchaser paid part of the purchase-money in cash, assumed the mortgage executed to Laurent, assumed and paid taxes on the land amounting to \$177, subsequently paid part of the mortgage, and executed to Greve his notes and mortgage for the residue of the purchase-money. At the time Francis Greve conveyed the land to Luntz, the appellees Joseph and John Greve were present and heard the deed read, but neither

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of them knew that he had any interest in the land. Luntz took possession of the land upon the execution of the conveyance to him, believing that he was the owner, and ignorant that the appellees had, or claimed to have, any interest therein; he continued in possession, and has paid taxes since his purchase amounting to \$477.29, and has made improvements to the value of \$828; he has received the rents and profits of the land, amounting to \$250 per annum; and the value of the taxes paid by him, together with the value of the improvements, is sufficient to liquidate the amount of the rents received. One of the appellees, Joseph Greve, about a year prior to the death of his father, Francis Greve, was informed by a neighbor, who had no interest in, or particular knowledge of, the matter, that he, Joseph Greve, had an interest in the land. This appellee lived about four miles from the land at the time his father conveyed it, but never mentioned the fact to the appellant that he had an interest in the land, or had heard that he had an interest therein. The purchase-money was paid in full to Francis Greve prior to his death, which occurred in September, 1875. The deed executed by Ann H. to Francis Greve was duly recorded on the 12th day of March, 1866. The conclusions of law stated by the court are as follows:

"1st. The deed from John B. Voors to Ann H. Greve did not convey to her a separate estate so as to exclude her husband from his marital rights in said land, and, therefore, that by the deed he became entitled to the land during the joint lives of himself and wife.

"2d. The deed from Ann H. Greve to her husband, Francis Greve, was and is void, and vested no title in him whatever beyond the title acquired by him by virtue of the deed from Voors to Ann H. Greve.

"3d. Upon the death of Ann H. Greve the land descended, two-thirds to the plaintiffs collectively (subject to whatever right Francis Greve may have had as tenant by the curtesy), and one-third to Francis Greve.

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"4th. The deed from Francis Greve to the defendant vested in him the title to one-third of the land in fee.

"5th. Inasmuch as that the said Francis Greve was entitled to the land during the lifetime of his wife, Ann Helen, she had no right of action against him in her lifetime to recover it, and hence the statute of limitations did not run against her, and her heirs are not bound by the lapse of sufficient time.

"6th. There is nothing in the facts found that can estop any of the plaintiffs to set up their respective rights to the land."

We have no doubt that the deed of Voors to his daughter conveyed to her the title to the land, but whether it operated to vest in her such an estate as excluded the husband from his rights as tenant by the curtesy, is not so clear. But, granting for the present that the appellant is right in his assumption that the deed did vest a separate estate in the wife to the exclusion of the husband, still, the deed of Ann H. Greve to her husband must be regarded as without force, and, if this be true, then the appellant's title fails. It has been held in this State from first to last, that a married woman can only convey her lands by a deed in which her husband unites. The question has been so often decided that it can not now be regarded as an open one. Our theory has always been that a married woman was disabled from conveying lands at common law, and that she could convey only by uniting with her husband in a deed.

The right of action did not accrue until the death of the husband, for during his life he was a tenant of the land by the curtesy. We think the true rule upon this subject is correctly declared by Chancellor KENT, who says, of a former conflict in the decisions upon the subject: "But it is now settled otherwise, and the husband is tenant by the curtesy if the wife has an equitable estate of inheritance, notwithstanding the rents and profits are to be paid to her separate use during the coverture. The receipt of the rents and profits is

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a sufficient seisin in the wife. And if the lands be devised to the wife, or conveyed to trustees for her separate and exclusive use, and with a clear and distinct expression that the husband was not to have any life-estate or other interest, but the same was to be for the wife and her heirs; in that case, the court of chancery will consider the husband a trustee for the wife and her heirs, and bar him of his curtesy." 4 Kent Com. (12th ed.) 31. The deed in the case before us does vest in the wife an estate of inheritance, and there are no clear and distinct words excluding the rights of the husband. The deed, in truth, differs very little from the ordinary form in use at the time it was executed, and the superadded words do not add strength to the words of limitation. At all events, there is nothing abridging the rights of the husband, for there are no clear words excluding him from his marital rights. There are very many cases declaring the same doctrine as that laid down by Kent; among them are: *Nightingale v. Hidden*, 7 R. I. 115; *Tyler v. Lake*, 2 Russ. & Myl. 183; *Massey v. Parker*, 2 Myl. & K. 174; *Wardle v. Cloxton*, 9 Sim. 524; *Jacobs v. Amyatt*, 1 Mad. 206 n.; *Wills v. Sayers*, 4 Mad. 409; *Roberts v. Spicer*, 5 Mad. 491; *Kensington v. Dollond*, 2 Myl. & K. 184; *Fears v. Brooks*, 12 Ga. 195; *Paul v. Leavitt*, 53 Mo. 595; *Ashcraft v. Little*, 4 Iredell Eq. 236; *Carter v. Dale*, 3 Lea (Tenn.) 710 (31 Am. R. 660); *Tremmel v. Kleiboldt*, 6 Mo. Ap. 549; *Stewart v. Stewart*, 7 Johns. Ch. 229; *Dubs v. Dubs*, 31 Pa. St. 149; *Cushing v. Blake*, 30 N. J. Eq. 689.

The statute of 1843 provides that, "When any man and his wife shall be seized, in her right, of any estate of inheritance in lands, and shall have issue, born alive, which might inherit the same, the husband shall, on the death of his wife, hold the lands for his life, as tenant thereof by the curtesy." The deed of John B. Voors certainly vested in Mrs. Ann H. Greve an estate of inheritance, and thus brought the case fully within the statute. It can not be doubted that as the survivor of his wife, whatever may have been his rights

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during her life, Francis Greve had a right to possession of the lands as tenant by the curtesy. As Greve had the right of possession the right of entry did not accrue until his death, and from that time, and not before, the statute began to run. *Butterfield v. Beall*, 3 Ind. 203; *Nicholson v. Caress*, 59 Ind. 39.

Counsel for appellant place much stress upon a statute enacted in 1847, which reads thus:

"That no real estate whereof any married woman was or may be seized or otherwise entitled to at the time of her marriage, or which she has or may fairly acquire during her coverture, or any interest therein, shall be liable for the debts of her husband, but the same and all interest therein, and all rents and profits arising therefrom, shall be deemed and taken to be her separate property, free and clear from any and all claim or claims of the creditors or legal representatives of her husband as fully as if she had never been married: *Provided*, That this law shall not be so construed as to apply to debts contracted by such married woman before such marriage, but in all such cases her said property shall be first liable therefor." Acts 1847, p. 45.

The contention is that this statute vests the wife's separate estate in her to the exclusion of the husband. We think this position untenable. It was not intended to abolish tenancy by the curtesy, but simply to protect the income of the property from seizure by the creditors of the husband. This was the construction given the statute in *Junction R. R. Co. v. Harris*, 9 Ind. 184, and we see no reason to question the soundness of that decision. The statute of 1847 is to be considered as a part of one great system of jurisprudence, and not as a distinct and separate rule of law, and, when thus considered, it goes no farther than to prevent creditors of the husband from seizing the income arising from the property of the wife. If the construction contended for by appellant were given it, the result would be an overthrow of the great body of the law then existing governing the rights of the husband

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in the lands of the wife, and such a result is one to be avoided unless the plain words of the statute rigorously lead to it. We may here aptly employ the language used by another court in a similar case: "Curtesy is a legal incident of the wife's estate of inheritance, and is a right favored in the law. A husband will not be excluded from rights in the property of the wife springing from the marital relation, except by words that leave no doubt of the intention to do so. *Massey v. Parker*, 2 Myl. & K. 174, 181. The married woman's act most effectually makes the estate of the wife her separate estate, and yet it has not abolished the husband's curtesy after her death. *Johnson v. Cummins*, 1 C. E. Green, 97; *Porch v. Fries*, 3 C. E. Green, 204." DEPUE, J., in *Cushing v. Blake*, *supra*.

Judgment affirmed.

Filed March 17, 1885.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—A very ingenious argument has been filed by appellant's counsel on the petition for a rehearing, but able as it is, it is based upon a false foundation. It is tacitly assumed that for the conveyance made by Ann Helen Greve to her husband, in 1850, he paid such a consideration as entitles the deed to be protected in equity. This assumption is not warranted by the finding, for it reads thus: "That in April, 1850, the said Ann Helen Greve executed a deed in the usual form, purporting to convey to her husband directly the land in controversy, for the consideration, as expressed in the deed, of love and affection and the sum of five dollars." There is here no valuable consideration, for it is too plain for controversy that the money consideration named is a mere formal and nominal one.

Many cases are cited by counsel to the effect that a deed from the husband to the wife, although void at law, may be protected in equity; but the difference between these cases and the present is very great; the husband is not under any disability; the wife is. The question is not as to the power of

alienation of a person free from disability, but the question is as to the power of alienation of a person disabled by coverture. There is, as stated in *Hunt v. Johnson*, 44 N. Y. 27 (4 Am. R. 631), another reason why a distinction is made between the two classes of cases, and that is this, the husband is under a legal duty to support his wife, but no obligation rests upon her to support her husband. Counsel have not cited any case where equity interposed to protect a husband, who paid no consideration for a conveyance to him of the lands of the wife, against the claims of her children, and we have seen none in the course of our investigation. Conceding that there are cases in which equity would protect the deed of the wife to the husband under our statutes, either of 1843 or 1852, still, the husband who claims under a mere voluntary conveyance is not entitled to invoke the exercise of the power of a court of conscience in his behalf. But we think that this concession is not warranted, for, as our cases uniformly declare, it has always been the law of this State that a married woman could only convey her property in a deed in which her husband joined. This was the common law, as shown by a recent writer, who says: "But a conveyance of lands by the wife directly to her husband, especially if it be voluntary, has been considered ineffectual and void. And even under the late married women's acts, her right to make such a conveyance is still generally, though not universally, denied." Schouler *Husband and Wife*, section 397. In *Scott v. Purcell*, 7 Blackf. 66, it was held that a married woman could not alienate her land "without joining in a deed with her husband." The question seems always to have been regarded as one of power, and as the wife has no power to execute a separate deed, there is no effective instrument upon which any court can act. No court can give force to what the law provides shall be without force. *Baxter v. Bodkin*, 25 Ind. 172. The statute of 1843 did not confer power on the wife to convey her real estate by her separate deed; on the contrary, it clearly requires a joint deed, for thus it reads: "The joint deed of the hus-

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band and wife, upon complying with the provisions of the fortieth section of this chapter, shall be sufficient to convey and pass the real estate of the wife, but not to bind her to any covenant or estoppel therein." R. S. 1843, p. 417, section 17.

Petition overruled.

Filed June 26, 1885.

No. 12,013.

DAWSON v. SHIRK.

108	184
137	225
102	184
141	424
102	184
100	567

PRACTICE.—Jury Trial.—Verdict.—A party upon whose demand, resisted by the other party, a cause in equity is tried by jury which should have been tried by the court, will not be permitted afterwards to question the mode of trial, and as to him the verdict will be treated in all respects as if the case were at law, and judgment entered accordingly.

SAME.—Special Verdict.—Judgment.—Damages.—Where a special verdict states the amount of damages found for the plaintiff, in the event that, upon the facts found, the law is for the plaintiff, and no data are furnished by the verdict from which the court can, by computation, ascertain the damages, judgment, if for the plaintiff, must be for the damages found by the jury. *Aliter*, if there be data found by the verdict, which will enable the court to compute the proper damages.

From the Howard Circuit Court.

F. M. Trissal, M. Bell and W. C. Purdum, for appellant.

R. Hill and R. N. Lamb, for appellee.

MITCHELL, C. J.—This action was brought by Dawson against Shirk to recover the value of a promissory note, which he alleged belonged to him, and which it was averred Shirk had obtained possession of through one Kinsey, who was made a party and against whom default was taken.

It was averred that Dawson and Kinsey had become sureties for one Burroughs, and that, as the proceeds of the sale of certain real estate upon which they had taken an indemnity mortgage, the note in question had become the property of Dawson. It was also averred that he had paid the entire debt upon which they had been jointly bound.

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It was averred that the note remained in the possession of Kinsey ; that he pledged it to Shirk as collateral security for an individual debt, and that Shirk had notice of Dawson's rights at the time he received it.

The complaint was in three paragraphs, two of which set up the foregoing facts, with much other incidental matter. The third was the common count for money, personal property and choses in action had and received, to the plaintiff's use. After issue joined, the appellee moved the court that all questions raised on the issues made on the first paragraph be tried by the court or referred to a master. This motion was overruled. The case was thereupon submitted for trial to a jury without further objection, upon which the court made an order, of its own motion, that the jury return a special verdict. At the proper time the jury returned a special verdict which was contained in two separate papers, one of which was entitled "Plaintiff's," the other "Defendant's." After setting out the facts in each paper, not altogether consistently, each concluded substantially as follows: "If, upon the facts aforesaid, the law is with the plaintiff, then we, the jury, find for the plaintiff and assess his damages at \$190.40. If, upon said facts, the law of the case is with the defendant Shirk, then we find for the defendant Shirk." Both papers were received as the verdict of the jury without objection. Thereupon the plaintiff moved for judgment on the special verdict for \$1,408, and the defendant moved for judgment for costs. Plaintiff's motion was overruled, whereupon he moved to set aside the concluding part of the verdict which assessed his damages at \$190.40, and asked to have a new jury empanelled for the purpose of assessing the amount of the recovery, specifying in his motion that the new jury, when called, should be instructed to assess the amount of his damages at \$1,408. This motion was also overruled, and judgment was rendered for plaintiff on the special verdict for \$190.40 and for costs, to which the defendant Shirk excepted.

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Dawson v. Shirk.

Dawson prosecutes this appeal, and assigns for error the overruling of his several motions above set out.

It is insisted by appellant's counsel, that, upon the facts found, the conclusion necessarily follows that the plaintiff's damages should have been assessed at \$1,408, and that judgment should have been rendered accordingly. The material facts found may be summarized thus: "Plaintiff's:"

1. On June 24th, 1875, Dawson and Kinsey, being sureties for Burroughs, took from him an indemnifying mortgage on certain real estate.

2. Dawson was compelled to pay the entire security debt, which amounted, when paid, to \$2,920.81.

3. Previous to and during the year 1878, Kinsey became indebted to Dawson for money paid to his use and for property sold, in the sum of \$2,522.25.

4. In and before September, 1876, Dawson and Kinsey had executed their notes in satisfaction of the indebtedness for which they were liable as the sureties of Burroughs, and at the September term, 1876, of the Hamilton Circuit Court, they foreclosed their indemnity mortgage, taking a decree in which it was adjudged that the land should be sold to pay the sum of \$1,216.71, that Dawson had paid as surety, and \$1,425.93 that had been paid by both Dawson and Kinsey. That the land was subsequently sold on the decree thus taken, bid in, and subsequently a title obtained by them jointly under this sale. That afterwards, on the 1st day of February, 1878, they sold and conveyed the land to William C. Duckwell for \$2,500, who paid to Dawson \$500 cash, and in payment of the balance transferred to them a note on John Duckwell for \$1,870, dated May 3d, 1876, with interest at 9 per cent. from May 3d, 1877. That this note was left in the possession of Kinsey for the benefit of himself and Dawson, and that Kinsey, without the knowledge or consent of Dawson, and at the request of Shirk, in March, 1878, induced Duckwell to execute a renewal note for two thousand dollars, bearing 8 per cent. interest, which renewal note Kinsey, without authority,

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transferred to Shirk as a collateral security for his debt to him. That Shirk, at the time of accepting the transfer of the note, knew that Dawson had an interest in it, and that in the month of April, 1879, he collected the note and applied to Kinsey's debt the proceeds, amounting to \$2,160.

9. That Dawson has realized from the proceeds of property transferred to him by Kinsey, and from payments, the sum of \$1,364, and that Kinsey is indebted to him on transactions outside of the Duckwell note in the sum of \$2,225.

A summary of so much of the special verdict as is material, entitled "Defendant's," may be stated as follows:

1. Previous to June, 1876, Dawson and Kinsey were co-sureties for Burroughs, and held an indemnifying mortgage from him on eighty acres of land.

2. In June, 1876, they executed their joint notes for \$2,-920.81 in discharge of the indebtedness for which they were sureties, to one Wilson. On August 15th, 1878, Dawson paid and discharged the joint debt to Wilson by executing his own notes secured by mortgage.

3. In 1876 Kinsey and Dawson foreclosed their indemnity mortgage, obtained a sheriff's deed for the land, and in February, 1878, sold it to Duckwell, receiving cash and note from him as described.

4. Dawson received the \$500 which was paid on the sale of the land.

5. The Duckwell note was renewed and transferred to Shirk as described.

6. Shirk had notice that Dawson claimed a half interest in the Duckwell note at the time he received it.

7. At the time Shirk received the Duckwell note he credited \$2,000, the amount of it, to Kinsey's debt.

8. In April or May, 1878, Kinsey transferred to Dawson certain notes or judgments on one Cook, of Rush county, in part payment of his indebtedness to him on account of the Duckwell note, upon which judgments Dawson afterwards collected \$864.

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9. At the time the Cook judgments were transferred to Dawson, he, Dawson, was only claiming one-half the Duckwell note, and he had notice at that time that it had been transferred to Shirk.

12. Kinsey, at the time of the transfer of the Duckwell note to Shirk, had no authority from Dawson to make the transfer.

15. That before the commencement of this suit Dawson, by his attorney, demanded of Shirk one-half the amount of the Duckwell note, and only claimed to own one-half the note up to and after the beginning of this suit.

The foregoing are all the facts material to be considered.

It is suggested by counsel for appellant that as the case, in some of its aspects, at least, is of equitable jurisdiction, the court should have treated the special verdict as advisory merely, and rendered judgment upon it as in chancery cases. Where, however, parties have submitted a cause to a jury for trial, as a law case, even though the cause is in other respects of equitable cognizance, it has been held that the verdict will be treated in all respects as in a law case. *Summers v. Great-house*, 87 Ind. 205. Especially should that be so in this case, after the appellee made an unsuccessful effort to secure a trial as in chancery.

Section 565, R. S. 1881, provides: "Where the verdict is special, or where there has been a special finding on particular questions of fact, the court shall render the proper judgment."

In the case of *Mitchell v. Geisendorff*, 44 Ind. 358, it was held that a judgment for \$8,000, rendered by the court on a special verdict returned by a jury, in which the amount of the recovery was assessed at \$175, was erroneous. It was there said, without further explanation: "The 'proper judgment' here named means a judgment on the verdict and can mean nothing else."

Of special verdicts, it is said in 2 Tidd's Practice, 901:

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"And the court will not alter a verdict, unless it appear on the face of it, that the alteration would be according to the intention of the jury."

In the case of *Reid v. State, ex rel.*, 58 Ind. 406, the court said: "Different agencies may be entrusted with the power of determining the facts in controversy between litigants, and stating the proper conclusions thereon. A jury, a referee, or the court may perform the duty; but where the duty in the premises, imposed upon any one of these agencies in a given cause, is general, the entire duty must be performed by that agency. A jury must find a verdict upon which a judgment can be rendered." It was there held that because the court had added \$419.57 to the amount found by a referee, error had been committed, the reason assigned being that the report did not furnish the court with data upon which to render a judgment differing in amount from that contained therein. It would seem as the result of the authorities that a proper construction of the statute requires that if data are given in a special verdict or special finding of facts, from which it clearly appears that the amount assessed by the jury is the result of an error in computation, or grows out of some omission, the proper judgment to be rendered by the court would be the amount which a correct computation made from the data furnished would indicate. *Sanders v. Scott*, 68 Ind. 130; *Case v. Colter*, 66 Ind. 336; *Hall v. Harlow*, 66 Ind. 448; *Medler v. Hiatt*, 14 Ind. 405.

Where a special verdict or special finding of facts is returned, nothing remains for the consideration of the court except to render the proper judgment on the facts found according to the law, and when the jury assess the amount of the recovery, the data furnished and facts found must be so inconsistent with the amount assessed as that the two can not be reconciled in order to justify the court in disregarding the assessment. Before a judgment can be rendered for an amount different from that assessed by the jury the conclu-

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sion must be irresistible from the facts and data given, that an error in computation, or an omission, growing out of a misconception of the relation to each other of the several facts specifically found, has occurred.

It is conceded by appellant's counsel, that if Dawson was entitled to but one-half the amount of the Duckwell note, the amount assessed was correct. The jury did not specifically find whether he was the owner of one-half or the whole of the note. As to that the special verdict is equivocal. Facts are stated which tend to support either view. Whether Dawson was the owner of the whole or one-half of the note, was a fact in dispute. Shirk answered a subsequent ratification of the transfer by him. From the facts stated and from those upon which the verdict is silent, the jury made the deduction of fact that he owned one-half, and their assessment was made accordingly.

To have rendered a judgment for a different amount would have involved a deduction of fact by the court different from that made by the jury. This the court had no right to do. Its sole duty was to make deductions of law from facts specifically and unequivocally found, and as in view of the equivocal findings of the jury, it could not be said as a conclusion of law that the appellant owned the whole note, the ruling of the court was right. It may be said, however, if it were conceded that Dawson owned the whole note, that we have been unable to discover any certain specific data in either or both the special verdicts upon which the amount of the judgment asked could have been predicated. To make the amount, data must be assumed outside of the finding.

Judgment affirmed, with costs.

Filed May 25, 1885.

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No. 11,815.

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124	171
136	373
102	191
138	85
103	191
144	231
102	191
164	358

LIBEL.—*Communication to Employer.*—A letter, written voluntarily, and for the sole benefit of the writer, to another's employer, using language such as must have been understood by the employer as charging the employee with having obtained goods from the writer by fraudulent means, was held to be libellous, and not a privileged communication.

EVIDENCE.—*Offer of Proof.*—An offer of proof should not be so general as to require the court, for the purpose of determining what facts are competent, to examine a mass of previous evidence, but should specifically state competent facts which it is expected to show.

SAME.—*Statements of Stranger Binding on Party.*—One who has directed another to a third person, for information or direction, will be bound by the statements made by such third person.

SAME.—*Intent.*—Where the intent with which one has done an act becomes material, it is proper to ask him as a witness what was the intent.

SAME.—*Objection to Evidence.*—There can be no available error in admitting evidence over objection, where no ground of objection is specifically stated.

INSTRUCTION TO JURY.—*Court not Required to Modify Erroneous Instruction Asked.*—Unless an instruction asked is correct in terms as prayed, the court is not bound to modify it, but may refuse it.

PLEADING.—*General Scope.*—A pleading must be judged by its general scope and tenor, and not by fragmentary statements therein.

SAME.—*Plea of Justification.*—A plea of justification in an action for libel must proceed on the theory that all the material averments of the complaint are admitted.

PRINCIPAL AND AGENT.—*Ostensible Authority of Agent.*—If a principal holds out an agent as possessing authority to control a shop or place of business, and a third person acts upon the faith of the appearances so created, the principal may be bound by the acts of such agent within the scope of such ostensible authority, although, as between the agent and his employer, no such authority in fact existed.

LIBEL.—*Construction of Writing.*—*Justification.*—Whether a written instrument is or is not libellous, and what will constitute justification for a libellous publication, are questions for the court, and not for the jury.

From the Marion Circuit Court.

H. Dailey and G. W. Wimpenny, for appellant.

S. Claypool, W. A. Ketcham and B. F. Watts, for appellee.

ELLIOTT, J.—The complaint of the appellee alleges that

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the appellant maliciously published a libel; that the libellous matter was contained in a letter written by the latter to a corporation called the Encaustic Tile Company, by whom the appellee was then employed. The letter, omitting the date, address, signature and formal part, is as follows:

"Mr. Schiffing owes me on work done on your dies, etc., \$33. If you would consent to retain such amount out of any money due him from you, let me know by return mail. If you will not consent to do so, I shall have to file a mechanic's lien on the goods. He got them of me by lying; first, he said he would bring an order from you, then he would pay cash for them before he took them away. He then watched his chances and took them when the foreman was not in, and now refuses payment."

It is also alleged that the appellee was dismissed from the service of the corporation to whom the letter was addressed, and he demanded special and general damages.

The language of the letter charges the appellee with having obtained property by corrupt and dishonest means. It is not necessary, in order to constitute even verbal slander, much less libel, that the charge that a corrupt or criminal act was committed should be made in direct terms. The question in such cases is, what meaning did the language employed convey to the mind of the person to whom it was addressed? *Seller v. Jenkins*, 97 Ind. 430. Words put in writing will often constitute a libel, which, if spoken, would not constitute actionable slander. We think it very clear that the corporate officers, who received and read the letter, must have understood that the writer charged the appellee with having obtained the property by fraudulent means, and, thus understood, the language was undoubtedly libellous. *Hake v. Brames*, 95 Ind. 161.

The letter was not a privileged communication. The information it professes to contain was volunteered, and the purpose for which it was conveyed to the appellee's employer was solely for the benefit of the writer, and was not intended

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to benefit the employer by giving him, in good faith and for a just purpose, information necessary for his protection against a knavish servant. .

The appellant introduced Samuel Shue, and after he had been examined in chief and had been cross-examined at great length and at the close of the re-direct examination, he was asked this question: "State whether or not you reported these facts in reference to this matter to Mr. Over?" Upon objection being made, the counsel made this statement: "We offer to show that this witness communicated all these facts to Mr. Over before the 15th day of June, the day the letter was written." In our opinion the offer was too general, for we do not believe it was the duty of the trial court to examine the mass of testimony to determine what facts were competent; on the contrary, we think it was counsel's duty to specifically state the facts which they expected to show that the witness communicated to their client. There were some facts stated in the testimony of the witness that it would not have been proper to communicate to the appellant, and the court was not bound to analyze the testimony and sift out the competent from the incompetent. This should have been done by the question and offer of the counsel. .

The appellee testified that he was directed by the appellant to his foreman, Mr. Cox, and thereupon the court permitted the appellee to testify what was said to him by the foreman. In this there was no error. Where a party directs another to a third person for information or directions, he is bound by the statements of such third person.

Our cases decide that where the intent with which an act is done becomes material, it is proper to ask what it was. *City of Columbus v. Dahn*, 36 Ind. 330; *Greer v. State*, 53 Ind. 420; *White v. State*, 53 Ind. 595, *vide* p. 596; *Shockey v. Mills*, 71 Ind. 288 (36 Am. R. 196); *Parrish v. Thurston*, 87 Ind. 437, *vide* p. 440. We think that the question asked the appellee, and objected to by the appellant, is fairly within the principle

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declared in these cases. It is competent in many cases, such as cases of fraud and the like, to ask a party a direct question, and we think this is an analogous case. So, too, where a negative is to be proved, it is often competent to ask a direct question. The reason for this is, that by proving affirmative facts to establish a negative conclusion, too much ground would be gone over and too much time consumed. Another reason is, that there are some cases where it is practically impossible to exclude every hypothesis by a course of affirmative questions, and, as the law is a practical science, it sometimes permits a direct question and answer upon a negative proposition.

If it were conceded that the court erred in permitting the appellee to inquire as to the aggregate amount in value of dies that had been made by the Encaustic Tile Company within a designated period, no available error was committed, for the reason that the grounds of objection were not specifically stated. But we think no error was committed, for the reason that the testimony tended to show the amount of the special damages sustained by the appellee.

The court refused to give the first instruction asked by the appellant, which reads thus: "The defendant in this cause, by his answer, admits that he wrote the letter which is alleged to be libellous, but says that the statements therein are true. By this answer the defendant only admits he wrote the letter; he does not admit that plaintiff was damaged thereby, or that he was in the employ of the Encaustic Tile Company; but the burden is on the plaintiff to show that he was in the employ of the Encaustic Tile Company, and that he lost said employment by reason of said letter, and that he has been damaged."

It is settled by many cases that unless the instruction as prayed is correct in terms, the court is not bound to amend or modify it, but may rightfully refuse it. *Goodwin v. State*, 96 Ind. 550, and authorities cited.

This instruction was not correct in terms, for the answer,

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by not directly controverting the allegation of the complaint that the appellee was employed by the Encaustic Tile Company, admitted it, for the failure to deny is an admission of the truth of a material allegation. The general scope and tenor of the answer filed by the appellant is that of a plea of justification, and it is by its general scope and tenor that it must be judged, and not by fragmentary statements cast into it. *Kimble v. Christie*, 55 Ind. 140; *Neidefer v. Chastain*, 71 Ind. 363 (36 Am. R. 198); *Mescall v. Tully*, 91 Ind. 96; *Western U. Tel. Co. v. Reed*, 96 Ind. 195, *vide* auth. cited p. 198; *Cottrell v. Aetna L. Ins. Co.*, 97 Ind. 311; *City of Logansport v. Uhl*, 99 Ind. 531.

A plea of justification proceeds, and can only rightfully proceed, on the theory that all the material averments of the complaint are admitted, and this is the theory of the answer before us, and it would, therefore, have been error to instruct the jury that it controverted one of the substantive and material averments of the complaint.

What we have said proves that the court below did not err in instructing that the answer admitted that the appellee was in the employment of the Encaustic Tile Company, and that he was discharged from it. It is true that mere allegations of value are not admitted by a failure to controvert them, but allegations of material facts are, and the employment and discharge of the appellee were material facts.

The third instruction given by the court reads thus: "The answer, among other things, charges and says that the plaintiff went into the shop where the dies were, while the defendant's foreman was absent from the shop, and without the knowledge or consent of the defendant, or his foreman, took and carried said dies away from the shop and custody of the defendant. On this point I instruct you, that if the plaintiff called or sent for the dies, and if he or the person whom he sent found at the defendant's shop any one there in charge of the shop who delivered the goods or dies to the plaintiff, or to any one sent by him for the dies, the law will presume that

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as between the public and the defendant, the person so delivering the dies had authority to deliver the dies, whether as between him and the defendant he had authority or not, and if the plaintiff simply went for or sent after the dies, and got them from a person so in charge of the defendant's shop, the plaintiff did not get the dies away without the knowledge of the defendant within the meaning of the law, even though both the defendant and his regular foreman were absent from the shop at the time the dies were taken away. But if the plaintiff watched his chances and availed himself of an opportunity to go for or send after the dies while the foreman was absent, for the purpose of getting possession without first paying for the dies, then that portion of the letter is proved true. On the other hand, if the plaintiff did not so watch his chances to get the dies away, but took the dies away with the consent of any one in charge of the shop, then in such case the defendant has failed to prove his letter true in that particular, even though the regular foreman was absent at the time the dies were taken away."

We perceive no substantial error in this instruction, although it is not very well drawn.

If the principal holds out an agent or servant as possessing authority to control a shop or place of business, and a third person acts upon the faith of the appearances so created, the principal may, in such a case as this, be bound by the acts of the apparent agent within the scope of his ostensible authority, although as between the agent and his employer no such authority in fact existed. It would, it is very clear, be unjust to impute sinister motives to a third person who had obtained an article from a person in charge of a shop without deceiving such person by false statements. We think it was proper to instruct the jury that it could not be inferred from the fact that appellee got the dies from the agent in charge of the appellant's shop, that he "had watched his chances," in the sense conveyed by that phrase as used in appellant's letter.

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Counsel are in error in asserting that the instruction assumes to inform the jury who appellant's agent or foreman was. It does not assert that any particular person was or was not his agent or foreman, but simply asserts the general principle, that placing a person in charge of a shop constituted such a person, as to third persons, an agent for the performance of such duties as pertained to the authority of one who in fact was rightfully in charge of the shop. It left it to the jury to decide whether the person from whom the dies were obtained was or was not the one in whose charge the shop was at the time they were obtained.

If the appellant had desired specific directions given to the jury upon the subject of the effect of knowledge of private instructions given by the principal to the agent, he should have asked the court to specifically instruct upon that subject. We think the instruction before us is good as far as it assumes to go, and under long settled and often declared rules it must be sustained. *Union M. L. Ins. Co. v. Buchanan*, 100 Ind. 63.

Counsel assume that the plea of justification was, so far as that branch of it is concerned, made out by evidence that appellee secured the dies from one who had no authority to deliver them, and this we regard as an undue assumption. The question is not whether the appellee got the dies from a person having no authority to deliver them, nor whether he got them without paying for them, for the language of the letter clearly imputes to him a corrupt and dishonest purpose, and it devolved upon the appellant to prove that this was the appellee's purpose. *Odgers Libel and Slander*, 169.

A written instrument is to be construed by the court and not by the jury. It was for the court to instruct the jury as to whether the letter was or was not libellous. *Gabe v. McGinnis*, 68 Ind. 538; *Young v. Clegg*, 93 Ind. 371, auth. cited p. 374. It would, therefore, have been proper for the court to have even more explicitly instructed the jury than it

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did as to what was necessary for the appellant to prove in order to constitute a justification.

The second instruction asked by appellant is not correct, for it asks the court to say to the jury that it was their exclusive province to determine from the evidence who, if any one, was authorized to deliver the dies to the plaintiff. As we have seen, the question of authority involved an element of law, and it would have been error to leave the whole question to the jury. It is evident that to give such an instruction would mislead the jury and induce in their minds the belief that they were to decide the whole question.

Judgment affirmed.

Filed April 24, 1885; petition for a rehearing overruled June 26, 1885.

102 198
126 126
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129 149
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130 356

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102 198
165 583

102 198
171 316

TAX SALE.—*Injunction.*—*Pleading.*—*Tender.*—*Payment.*—*Equity.*—A complaint to enjoin the issue of an auditor's deed upon an illegal sale of lands for taxes, which fails to aver a tender and to make an offer to pay the lawful taxes to the defendant, is bad on demurrer.

PRACTICE.—*Pleading.*—*Error.*—*Demurrer.*—The overruling of a demurrer for want of sufficient facts to one bad paragraph of a complaint is a fatal error, unless it clearly appears that the judgment for the plaintiff was based upon another paragraph.

From the Starke Circuit Court.

J. M. Judah and *O. B. Jameson*, for appellant.

J. M. Howard and *E. P. Hammond*, for appellee.

Howk, J.—On the 13th day of December, 1882, the appellee, Peabody, as sole plaintiff, commenced this suit against the appellant Rowe and William Perry, auditor of Starke county, and Francis Smith, attorney-in-fact for William Rowe, as defendants. Afterwards, on December 28th, 1882, the parties appeared in open court, and, on appellee's motion, it was

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ordered by the court that upon appellee's filing his written undertaking with surety to the court's approval, the appellant Rowe should be enjoined, until the first day of the next term of court and its further order herein, from receiving, and the defendant Perry, as such county auditor, from executing to Rowe, any tax-title deeds to or for the lands described in appellee's complaint; and the cause was continued. Thereafter, on the 3d day of January, 1883, the appellee filed his written undertaking, with surety approved by the court, as required by the restraining order theretofore granted. Afterwards, on March 31st, 1883, an order of the court was entered, enjoining the auditor of Starke county from making any tax deed or deeds of the lands in the complaint described, until the further order of the court, and the cause was again continued.

Afterwards, on June 1st, 1883, the appellee filed in open court his amended complaint, in two paragraphs, being the only complaint in the record. The appellant Rowe alone appeared to this amended complaint, and, his demurrer to the first paragraph thereof having been overruled by the court, he answered by a general denial of the entire complaint. He also filed his cross complaint, to which the appellee answered or replied by a general denial. The cause being at issue was tried by the court, and a finding was made that the appellee was the owner of all the lands described in his complaint. Upon this finding the court adjudged and decreed that appellee's title in and to all such lands should be forever quieted and set at rest, and that appellant, and all persons claiming under him, should be forever enjoined from asserting any claim or title to such lands, and that appellant pay the costs accrued to the time of filing his cross complaint, and that appellee pay the costs made after that time, without relief.

The court further found that the appellant's tax title was invalid and insufficient to convey the title to such lands, but that it was sufficient to and did carry and support a lien on the lands for the amount of all taxes, costs and charges paid,

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together with six per cent. interest thereon, amounting in the aggregate to the sum of \$1,771.87, which sum was due the appellant from the appellee. Upon this finding the court decreed that the appellee should, within ninety days thereafter, pay into court for the use of the appellant the sum found due him as aforesaid, with costs, and that, in default of such payment, such lands, or so much thereof as might be necessary to pay such sum, with interest, costs and accruing costs, should be sold as other lands were sold on execution, without relief from valuation or appraisement laws, and without any redemption from such sale by the appellee, or by those claiming under him. The appellant's motion for a new trial having been overruled, he has appealed to this court.

The first error of which complaint is made in argument on behalf of the appellant is the overruling of his demurrer to the first paragraph of appellee's complaint.

The appellee alleged in the first paragraph of his complaint, that he was the owner in fee simple of certain real estate, particularly described, in Starke county; that the appellant unlawfully and wrongfully claimed to have an interest, claim and lien in, to and upon such real estate, adverse to the appellee, the exact nature of which appellee did not know, but believed it to arise out of, and to be founded upon, a pretended sale for taxes; that appellant threatened to procure a tax deed to such real estate from his co-defendant Perry, the auditor of Starke county, who would issue such tax deed if not restrained by the court; that the time of redemption from such tax sale would expire before the trial and hearing of this cause, and appellee prayed that the appellant might be enjoined from receiving, and the defendant Perry from issuing, any tax deed to or for such real estate until the final hearing and determination of this cause; that such pretended sale was what was commonly known as a private sale, made privately and without any notice whatever, and was absolutely void; that such pretended sale for taxes was null and void, and it and appellant's adverse claim, and pretended lien, were

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a cloud upon appellee's real estate; that such pretended sale of such real estate was made on the 22d day of March, 1881, by the auditor of Starke county, privately and without any notice whatever of such sale, by publication in any newspaper or otherwise. Wherefore appellee prayed that such title be quieted in him, that such cloud be removed therefrom, and that appellant be forever enjoined from setting up any claim, title or interest in or to such real estate, and from receiving any tax deed therefor from such auditor, founded upon such pretended and void sale for taxes, and that such county auditor, and his successors in office, should be forever enjoined from issuing any tax deed to appellant for such real estate upon such pretended and void sale, and for all other proper relief.

To this paragraph of complaint the appellant demurred upon the ground that it did not state facts sufficient to constitute a cause of action, and this demurrer was overruled by the court. It is earnestly insisted by appellant's counsel, that this ruling of the court was error, and an error of such a character as was not cured by any subsequent action of the court, and as entitles appellant to the reversal of the judgment and decree of the lower court; and, in this view of the case, we fully concur with his counsel.

The appellee's case, as shown by the record, is an appeal to a court of equitable jurisdiction to be relieved from an alleged illegal sale of his lands to the appellant, for unpaid delinquent taxes. It is not claimed that his lands were not liable to taxation, or that the taxes assessed thereon were illegal and unjust, or that the taxes, for which such sale was made, had been paid by appellee and were not delinquent at the time the sale was made. But the only objections, urged by appellee to the validity of such sale, were that the sale to appellant was a private sale and made without any notice by publication or otherwise. The objection urged by appellant's counsel, to the sufficiency of the first paragraph of appellee's complaint, is that it fails to allege any tender by

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him of the money due from him and paid, on account of his delinquent taxes, by the appellant in the purchase from the proper officer of such real estate for the amount of such taxes, etc. The rule in equity is familiar which requires that a suitor in equity, seeking equitable relief, must show that he has first offered to do equity, or he will have no standing in a court of equity, and can maintain no suit for the procurement of equitable relief. This rule in equity was applied by this court in *Harrison v. Haas*, 25 Ind. 281, to a case very similar in most respects to the case at bar. There, as here, the appellee Haas alleged in his complaint, that he was the owner of certain real estate which had been sold for taxes, and that a certificate of such sale had been executed and delivered by the county auditor to the appellant Harrison, as the purchaser at the tax sale; that at the time of such sale, and at all times prior thereto after the assessment of such taxes, Haas was the owner of personal property in the county, liable to sale for such taxes; that, without any attempt to make such taxes out of such personal property, the county treasurer advertised and sold such real estate to Harrison for such taxes; and that Harrison held the certificate of such sale and claimed a tax deed thereunder, and that such certificate was a cloud upon his title. Prayer for the cancellation of such certificate, and that the auditor be enjoined from making a deed to Harrison.

Upon a demurrer to this complaint, it was held bad by this court, upon the ground that a court of equity would not interfere to give the owner of the real estate the relief sought, until the amount of the taxes had been paid or tendered to the purchaser. Speaking of the claim of the owner of the real estate, in such a case, the court there said: "He asks a court of equity to deprive a purchaser, who has paid the taxes legally due from the plaintiff, of the color of title, which is his only means of enforcing the moral obligation resting upon the plaintiff to make good to him the sum which, through the default of the plaintiff, the officer, under color

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of law, induced him to pay in discharge of the plaintiff's debt. He asks a court of equity to place him in a better position than he would have occupied if he had at the proper time paid the taxes legally assessed against him, and which were a lien upon his land: that the court shall remove the cloud, without the payment of the debt. *Qui sentit commodum, sentire debet et onus* is a maxim of the law; and, although the law can not apply its maxims in all cases, yet equity will not violate them. It will not so much as lift a finger to remove a cloud, while a moral obligation remains undischarged."

The case cited was approved and followed in *McWhinney v. Brinker*, 64 Ind. 360, where it was held by this court that, in an action to set aside an illegal and void sale of land for delinquent taxes, and to have the certificate of such sale cancelled or annulled, the plaintiff must both allege and prove a tender of the amount necessary to redeem. In the recent case of *Lancaster v. DuHadway*, 97 Ind. 565, it was further held by this court that a complaint to set aside a sale of land for taxes, and to cancel the certificate of such sale, on the ground that the plaintiffs have tendered the amount of the taxes and the interest thereon to the purchaser, is insufficient upon demurrer, unless the plaintiffs aver therein that they bring the money tendered into court for the defendant, or that they offer to pay it upon obtaining the relief demanded. The court there said: "The complaint is an application to a court of equity to cancel a certificate of purchase and to enjoin the auditor from executing a deed to the purchaser. This invokes the equitable aid of the court, and it is well settled that a court of equity will not extend its aid to a party who does not himself do equity. * * * This rule requires a party who seeks the equitable aid of a court, in order to protect himself against his adversary in such a case as this, to bring the money due him into court, so that he can take it when the relief is granted. The tender of the money does not pay the debt, and if the relief were granted

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without requiring its payment, the court would deprive the purchaser of his only protection by destroying the muniments of his title while the money due him remains unpaid. This a court of equity will not do."

Upon the foregoing authorities it is very clear, as it seems to us, that the first paragraph of appellee's complaint, of which paragraph we have heretofore given in this opinion a full summary, does not state facts sufficient to constitute a cause of action, or to entitle him to the equitable relief he demands therein. Therefore, the trial court clearly erred, we think, in overruling the appellant's demurrer to the first paragraph of complaint. This much, indeed, is virtually conceded by the appellee's learned counsel, in their argument of this cause. But counsel claim that the error of the court, in overruling the demurrer to the first paragraph of complaint, was a harmless error; because, they say, the judgment and decree of the court were rendered wholly upon the second paragraph of complaint, which was not demurred to and which, they argue, states a good cause of action. This position of counsel is not sustained by the record. On the contrary, we think, it is fairly shown by the record that the preliminary restraining orders and the final judgments and decrees, the substance of each of which we have heretofore given in this opinion, were in fact made and rendered by the court wholly upon the first paragraph of complaint. In civil suits, the rule upon the point under consideration, as repeatedly declared in the decisions of this court, is thus stated: Where the judgment below is rendered upon a complaint of two or more paragraphs, and it appears that a paragraph, which is clearly bad, has been held good upon a demurrer thereto for the want of sufficient facts, and the ruling is assigned here as error, the judgment will be reversed by this court, unless the record shows clearly and affirmatively that such judgment was rendered wholly and exclusively upon the good paragraph, and not, also, on the bad paragraph of complaint. In the case in hand, it is enough to say that the

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record before us does not show that the judgment and decree below were rendered wholly and exclusively upon the second paragraph, and not, also, on the first paragraph of complaint. *Evansville, etc., Co. v. Wildman*, 63 Ind. 370; *Pennsylvania Co. v. Holderman*, 69 Ind. 18; *Ethel v. Batchelder*, 90 Ind. 520; *Lang v. Oppenheim*, 96 Ind. 47.

Other errors are complained of by the appellant, but we need not extend this opinion in the consideration of the questions thereby presented, because the record clearly shows that in this suit the appellee has no standing in a court of equity. This is even shown by the terms of the final decree, wherein he was given ninety days after the date of the decree to do what equity required him to do, before he commenced his suit.

The judgment is reversed with costs, and the cause is remanded with instructions to sustain the demurrer to the first paragraph of complaint, and for further proceedings.

Filed May 25, 1885.

No. 11,678.

WAREY v. FORST.

MARRIED WOMAN.—*Surety for Husband.*—*Compromise of Threatened Litigation.*—*Promissory Note.*—*Mortgage.*—Under section 5119, R. S. 1881, a note and mortgage executed by a married woman, upon her separate land to secure her husband's debt, are void; and the mere facts, without more, that the mortgagee believed he could subject said land to the payment of such debt, as having been conveyed to the wife to defraud the husband's creditors, and was threatening to bring suit for such purpose, and that, for the purpose of avoiding such threatened litigation, the note and mortgage were executed, is not sufficient to bind her as principal.

SAME.—*Suit to Cancel Note and Mortgage.*—*Pleading.*—*Fraud.*—In a suit by a married woman to cancel a note and mortgage executed by her to secure her husband's debt, a paragraph of answer by the mortgagee confessing the plaintiff's title to the land mortgaged, setting up nothing in avoidance, and seeking argumentatively to deny the complaint, by

106	205
127	488
102	205
128	29
102	205
135	669
102	205
144	24
102	205
150	396

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stating that the plaintiff has no title in the land because of fraud, is bad on demurrer.

SAME.—Estoppel.—Evidence.—One who takes a mortgage from a married woman to secure her husband's debt, with knowledge that her title is fraudulent as against creditors of the husband, is estopped, in a suit by her to cancel the mortgage, from proving the fraud for any purpose.

From the Noble Circuit Court.

J. D. Ferrall, A. A. Chapin and R. P. Barr, for appellant.
J. H. Baker and J. A. S. Mitchell, for appellee.

BICKNELL, C. C.—The appellee brought this suit against the appellant to cancel her note and mortgage held by him.

The complaint alleged that the plaintiff's husband owed the defendant \$2,122, and that she, without any consideration, at the request of the defendant, and as surety of her husband, joined her husband in executing said note, and to secure the payment thereof joined her husband in executing said mortgage upon her own separate land.

The cause was tried by the court upon the complaint and the general denial. The court, at the request of the plaintiff, found the facts specially, in substance as follows:

1. That on April 29th, 1882, the plaintiff was, and still is, the wife of Jacob Forst, and on that day had, and still has, the possession and legal title of said mortgaged land.

2. That on said day the plaintiff's husband owed the defendant \$2,172.20, his own separate debt.

3. That on said day defendant verily believed that he had a valid claim against the plaintiff to subject said land to the payment of said debt, on the ground that, as he believed, said Jacob Forst, while so indebted to him, had bought and paid for said land, and had procured the conveyance thereof to the plaintiff without consideration therefor, and with intent to defraud his creditors, and especially said defendant, and that defendant, so believing, had employed an attorney to commence an action in the Elkhart Circuit Court to subject said land to said claim.

4. That on said day the plaintiff, being informed of de-

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fendant's purpose to commence such suit, executed said note and mortgage for the purpose of avoiding such threatened litigation, and for the purpose of cancelling and paying her husband's said indebtedness, there being no other consideration therefor, and that said mortgage was duly recorded in Elkhart county on May 1st, 1882.

Upon the foregoing facts the court stated the following conclusions of law:

1. That the contract of said plaintiff in the execution of said note and mortgage was a contract of suretyship, and that she executed both said note and mortgage as surety for said Jacob.

2. That said contracts of suretyship were and are void as to her, and that she is entitled to a decree declaring the cancellation of said note and said mortgage as to her.

The defendant excepted to said conclusions of law, and excepted specially to the conclusion that said mortgage was void as to said plaintiff.

The defendant then moved for judgment in his favor on the special findings. This motion was overruled.

The defendant also moved for judgment in his favor as to the said mortgage, and that the same be declared valid and binding on the plaintiff, and this motion was overruled. The court then rendered judgment for the plaintiff in accordance with its conclusions of law. The defendant moved to modify the judgment, so as to declare said mortgage valid, and this motion was overruled. The defendant appealed from the judgment. He assigns several errors; we will consider those only which are discussed in his brief. The principal questions discussed arise upon the following specifications of error:

9. The court erred in its conclusions of law.

10. The court erred in overruling the appellant's motion for judgment on the special findings.

11. The court erred in overruling the appellant's motion for a judgment affirming the validity of the mortgage.

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14. The court erred in refusing to modify the judgment so as to affirm the validity of the mortgage.

Upon an exception to conclusions of law the facts specially found are deemed to have been correctly found. *Dodge v. Pope*, 93 Ind. 480.

In the present case the special findings show that the plaintiff's husband was the debtor of the defendant, and that the plaintiff, for the purpose of avoiding a threatened litigation, and for the purpose of paying and cancelling her husband's indebtedness, executed the note and mortgage in controversy; she thereby undertook to become her husband's surety. The finding shows that she did this on the 29th of April, 1882. At that time the statutes of 1881 were in force, and section 4 of the act of April 16th, 1881, entitled "An act concerning husband and wife," Acts 1881, p. 528; R. S. 1881, section 5119, is as follows: "A married woman shall not enter into any contract of suretyship, whether as endorser, guarantor, or in any other manner; and such contract, as to her, shall be void." This section forbids a married woman to become a surety for anybody; she may pay her husband's debts, but not by becoming surety therefor.

It was held by this court in *Allen v. Davis*, 101 Ind. 187, that where a married woman signs a note of her husband as surety, and they join in a mortgage of the wife's land to secure the payment of the note, she is not liable on either note or mortgage, the promise in the mortgage being no more binding on her than the promise in the note. To the same effect is the more recent case of *Dodge v. Kinzy*, 101 Ind. 102.

But the appellant claims that the conclusions of law are wrong, because the finding shows that the note and mortgage were executed not merely for the purpose of cancelling and paying the husband's debts, but also for the purpose of avoiding a threatened litigation. The finding is that the defendant believed that Jacob Forst, while indebted to him, had bought and paid for the mortgaged land, and had procured its conveyance to his wife, the plaintiff, without consideration,

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and with intent to defraud his creditors and the defendant; and that the defendant also believed that he had a valid claim against the plaintiff to reach said land, and subject it to the payment of said Jacob's indebtedness, and had employed an attorney to bring a suit for that purpose, and had notified the plaintiff thereof; and that the plaintiff, for the purpose of avoiding said threatened litigation, and for the purpose of discharging her husband's debts, executed the note and mortgage.

The appellant claims that the finding shows "a legal compromise of a doubtful claim or right," and that, therefore, there was a sufficient consideration moving from appellant to appellee, so that she was, in fact, not surety, but principal in the execution of the note and mortgage.

It was held in *Fitzpatrick v. Papa*, 89 Ind. 17, that "A married woman who executes a mortgage to secure the release of a valid lien can not escape the consequences of her act upon the ground that the mortgage was executed to secure the debt of the husband. The benefit moves to her, for it relieves her property from a burden."

In the present case, however, there was no valid lien made to appear. The finding does not show the compromise of any actually existing liability; it states only the belief of the defendant that he had a claim, without any fact upon which such belief is founded; it is not found that there was any valid claim against the plaintiff; it is not found that Jacob Forst was insolvent when the conveyance was made to his wife, the plaintiff, nor that the property was bought and paid for by him; it is not even found that the conveyance of the land to Mrs. Forst was caused to be made by her husband, nor that she paid nothing for it; the finding merely states the defendant's belief that such was the fact, without anything to warrant such belief. There is no fact found upon which even a doubtful claim could arise in favor of the defendant against the plaintiff. A threatened litigation, founded merely on the

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defendant's belief, without any fact to support the belief, amounts to nothing, and the purpose to avoid such a litigation was no consideration for the plaintiff's promises.

In *Jarvis v. Sutton*, 3 Ind. 289, this court said: "It is true a compromise of doubtful claims may be sufficient to found a consideration upon, but in such cases there must be a surrender of some legal benefit which the other party might have retained. * * * A promise to give something for the compromise of a claim, about which there is merely a dispute and controversy, and for which there is no legal foundation whatever, is not sufficient to sustain a suit at law."

In the case of *Wade v. Simeon*, 2 C. B. 548, the declaration alleged that the plaintiff had commenced an action against the defendant to recover certain moneys, and that in consideration that the plaintiff would forbear to proceed in that action until a certain day, the defendant promised that he would on that day pay the amount, but he made default, etc. Plea, that the plaintiff never had any cause of action against the defendant in said action so commenced, which he, the plaintiff, at the commencement of said action and thence until and at the time of the making of the promise, well knew. It was held, on demurrer, that this plea was sufficient. So, in *Edwards v. Baugh*, 11 Mees. & Welsby, 641, the declaration alleged the existence of disputes and controversies between the parties as to whether or not the defendant was indebted to the plaintiff in £173 for money lent, and that the defendant, in consideration of the plaintiff's promise not to sue him at any time therefor, and to accept £100 in full satisfaction, promised the plaintiff to pay him the sum of £100 within a reasonable time. The court held that the declaration was bad, as not showing a sufficient consideration for the promise, there being no allegation of any debt actually due, but merely that a dispute and controversy existed respecting a claim which defendant believed to exist, but the actual existence of which was not averred. It is very clear that if the finding in the present case had been

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merely that the wife executed the note and mortgage to pay her husband's debt, she would not have been liable thereupon. *Allen v. Davis, supra*, and *Dodge v. Kinzy, supra*. And it may be conceded that if the finding had shown that the defendant had any lien on the wife's land, or if any facts had been stated in the finding showing that the defendant had any valid claim which might be enforced against the wife's interest in the land, in such a case, the wife might be considered the principal, and the compromise of such a valid claim against her own land would be a sufficient consideration to bind her as principal, although it was also a part of the consideration to secure her husband's debt. But the finding under consideration states nothing at all as to the existence of such lien or claim against the wife's land. The statement is simply that the "defendant believed he had a valid claim against the plaintiff, and was threatening to bring suit upon it, and that, for the purpose of avoiding such threatened litigation, the note and mortgage were executed." If A. were suing B. on any verbal promise, it would not be sufficient to allege in the complaint that A. believed he had a valid claim against B. and was threatening to sue him, and that thereupon, "for the purpose of avoiding such threatened litigation," B. promised; such a complaint would be bad because, instead of stating a consideration, it would merely state a motive. The complaint, to be good in such a case, must state an actual indebtedness of B. to A., or facts showing a valid claim, and then a compromise thereof as the consideration of the promise sued on. So, here, so far as the finding shows that the note and mortgage were executed for the purpose of avoiding a threatened litigation of a supposed claim, not found to have any real existence, it does not state any consideration; it simply states a motive.

In *Standley v. Northwestern M. L. Ins. Co.*, 95 Ind. 254, ELLIOTT, J., said: "There is an essential difference between the motive which induces a party to enter into a contract and the consideration yielded for its support. 'Motive,' said an Eng-

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lish judge, 'is not the same thing with consideration.' *Thomas v. Thomas*, 2 Q. B. 851. In *Philpot v. Gruninger*, 14 Wall. 570, it was said: 'It is, however, not to be doubted that there is a clear distinction sometimes between the motive that may induce to entering into a contract and the consideration of the contract. Nothing is consideration that is not regarded as such by both parties.' To a like import is the decision in our own case of *Clark v. Continental, etc., Co.*, 57 Ind. 135, where it was said: 'The motive prompting one to execute a contract, and the consideration of the contract, are entirely different things.' The motive which influenced the appellant to take out the policy was the desire to secure the loan, but this was not the consideration on which the contract of insurance rested; on the other hand the desire to secure premiums on the policy influenced the appellee to make the loan, but this was not the consideration given for the note and mortgage; that consideration was the loan of money."

The finding does not use the word "consideration;" it states that the note and mortgage were executed "for the purpose of," but if the word "purpose" means here the same as "consideration," then the finding states two considerations, one of them illegal and the other insufficient.

We think there was no error in the conclusions of law, nor in overruling the plaintiff's motions for judgment upon the findings, and for the modification of the judgment. The plaintiff really executed the note and mortgage to secure her husband's debt, and both note and mortgage were void as to her, under section 5119, R. S. 1881.

As to the motion for a new trial, it is sufficient to say that there was evidence tending to sustain the findings; therefore, under the well known rule of this court, they can not be disturbed. The findings were not contrary to law.

The appellant says there was error in sustaining the demurrer to the first paragraph of his answer. That paragraph averred that Jacob Forst, the appellee's husband, was indebted to the defendant, and while so indebted bought and

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paid for the mortgaged land, and had it conveyed to the plaintiff, who paid nothing for it; that said Jacob thereby intended to defraud his creditors and the defendant, and that such fraudulent intention was at the time well known to the plaintiff; that since the title was thus vested in his wife said Jacob has not had any property subject to execution.

There was no error in sustaining the demurrer to this paragraph of the answer.

The paragraph confesses that the plaintiff was, as alleged in the complaint, the owner of the land, and mortgaged it as surety to secure her husband's debt. It contains nothing in avoidance; it seeks argumentatively to deny the complaint, by stating that the plaintiff has no title to the land because of fraud. If this could be shown at all, it would be admissible under the general denial, but it could not be given in evidence by the defendant against the plaintiff under any form of pleading.

The appellant says in his brief that the same question arises on the ruling on the demurrer to the first paragraph of the answer, and on the exclusion of evidence of the matters therein set forth. The excluded evidence, however, sought to impeach the plaintiff's title for fraud, the defendant having recognized her title by taking a mortgage with notice. *Conklin v. Smith*, 7 Ind. 107; *Rennick v. Bank of Chillicothe*, 8 Ohio, 529; *Fitch v. Baldwin*, 17 Johns. 161.

The appellant says: "I admit that we are estopped from attacking her title on account of fraud, for the purpose of disturbing it, because, with knowledge of the fraud, we have treated with her concerning the subject-matter of it;" but he claims a right to show the fraud for the purpose of proving that she was a principal, and not a surety, in the execution of the note and mortgage. But we think that the defendant is estopped from proving the fraud, in this action, as against the plaintiff, for any purpose.

There was no error in excluding the testimony now under consideration.

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We have now examined all the matters of alleged error discussed in the appellant's brief. We find no error in the record. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

MITCHELL, C. J., took no part in the determination of this case.

Filed April 2, 1885; petition for a rehearing overruled June 12, 1885.

No. 12,130.

THE STATE, EX REL. ROWE, *v.* BRITTON.

GUARDIAN AND WARD.—*Defective Bond.*—*Omission of Penalty.*—A guardian's bond is valid and enforceable although no penalty is named therein.

SAME.—*Failure to Approve Bond.*—The bond of a guardian is not invalidated by a failure to approve it.

SAME.—*Mistake.*—*Pleading.*—A complaint which shows a mere mistake of law is not good; in order to be good it must contain allegations showing a mistake of fact.

From the Montgomery Circuit Court.

T. E. Ballard and M. E. Clodfelter, for appellant.

J. M. Thompson, W. B. Herod and W. H. Thompson, for appellee.

ELLIOTT, J.—The bond upon which the relator's complaint is based reads thus: "We, Edward G. Rowe and William Britton, are bound unto the State of Indiana in the sum of ——— dollars, for the payment of which we bind ourselves, jointly and severally, firmly by these presents. Sealed and dated this 4th day of October, 1873.

"If the above bound Edward G. Rowe will faithfully discharge his duties as guardian of the person and property of Henry Rowe, Mary L. Rowe, Edward G. Rowe and John

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R. Rowe, minor heirs of Mary Rowe, deceased, then the above obligation is to be void, else to remain in force."

It will be observed that there is no penalty stated in the bond, and this it is contended by the appellee renders it ineffective. The relator, on the other hand, contends that the bond is not invalid, but that the principal and sureties are bound to the extent contemplated by the law.

Section 4 of the act "touching the relation of guardian and ward," in force at the time the bond was executed, required of the guardian a bond; and section 5 provided that "Such guardian's bond shall not be void on account of any informality, illegality, or defect, either formal or substantial, in the same, nor on account of any defect, informality, or illegality in the appointment of such guardian; but shall have the same force and effect as if such appointment had been legally made, and such bond legally executed." 2 R. S. 1876, p. 588. This statute is as broad and comprehensive as it was possible for the Legislature to make it, and it makes all bonds effective no matter what omissions are found to exist. It holds sureties liable for the faithful discharge of the duties of the guardian, and makes them responsible for losses arising from a breach of duty. The omission of the penalty does not invalidate the bond; notwithstanding its omission the bond still holds the surety responsible for the acts of the guardian. The failure to prescribe the penalty leaves the surety's liability to be ascertained by determining the duty of the guardian and the loss resulting from the failure to perform it. The failure to name the penalty does not avoid the bond; it simply leaves the measurement of the recovery to be ascertained by finding the loss resulting from the failure to perform the duties enjoined by law. As there is no penalty named, there is no limit to the responsibility or to the amount of the recovery, except that it can not exceed that contemplated by law, and that is ascertained by looking to the statute and by ascertaining the property of the wards with which the guardian is chargeable.

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The law is a silent factor in every contract. It is an element that can not always be excluded, and can never be excluded without express words. But here the case is peculiarly strong. The law expressly provides that no defect shall avoid the bond, but that, whatever its terms, it shall secure the performance of the duties imposed upon the guardian. Thus speaks the statute in plain terms, and we can do no less than give effect to its provisions. By omitting to name the penalty the guardian was not relieved from any duty, nor the surety from any responsibility, for the law defines the duty, and the surety undertakes that it shall be performed. This is the plain declaration of the statute, and the omission to make the bond perfect in all its parts can not defeat this statute. *Yeakle v. Winters*, 60 Ind. 554.

Parties are held to contract with reference to the law. *State, ex rel., v. Berg*, 50 Ind. 496. The appellee must, therefore, be deemed to have contracted with reference to this statute, and can not escape its force upon the ground that he did not execute a perfect bond. As he did not execute a bond perfect in all its parts, he left it to the law to supply its imperfections, so as to make it effective for the purpose for which it was intended. As the bond is not perfect and complete, the law enters and remedies all defects. *Stevenson v. State, ex rel.*, 71 Ind. 52, auth. p. 57. The statute quoted is specially directed to such a case as this, and covers it on all sides; consequently there is no necessity for examining other statutes.

The failure to approve the bond did not invalidate it. Having accomplished the purpose it was intended to accomplish, and the parties having secured the consideration upon which it was founded, it is not rendered ineffective by the failure to formally approve it. *Smock v. Harrison*, 74 Ind. 348; *Jones v. Droneberger*, 23 Ind. 74; *Railsback v. Greve*, 58 Ind. 72; *Easter v. Acklemire*, 81 Ind. 163.

It is not necessary to examine or determine what the effect of the statute would be if a penalty had been stated, for, as there is no penalty named, the statute is let in, and the amount

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of the recovery is to be ascertained by its provisions. These we are to look to for the duties of the guardian and the measure of the liability of the surety, and the facts stated in the complaint show the loss resulting from a failure to perform those duties.

It results from what we have said that the first paragraph is good, and that the court erred in sustaining the demurrer to it.

The second paragraph proceeds upon the theory that there is a mistake in the bond. It is not good upon this theory, and, therefore, not good at all. *Western U. Tel. Co. v. Reed*, 96 Ind. 195; *Cottrell v. Aetna L. Ins. Co.*, 97 Ind. 311; *City of Logansport v. Uhl*, 99 Ind. 531 (50 Am. R. 109). It is not good, for the reason that it does not show a mistake of fact; for aught that appears the mistake was one of law. It is not good for another reason; it does not state such facts as show a contract between the parties and a mistake in committing it to writing.

Judgment reversed, with instructions to overrule the demurrer to the first paragraph of the complaint.

Filed June 12, 1885.

No. 8423.

BOYD ET AL. v. ANDERSON.

DEED.—Reformation of.—Judgment Creditors.—Equity.—Judgment creditors are in no sense purchasers; their judgments are simply general liens upon whatever interest the judgment defendants may have in the land, and their rights do not stand in the way of the reformation of prior deeds and mortgages, nor of the enforcement of equities as between the grantor and grantee.

SAME.—Mistake of Law and Fact.—Personal Defence.—Waiver.—In a suit by a bona fide grantee against his grantor for the reformation of a deed, on the ground of mistake, the defence that the mistake is one of law and not of fact is personal to the grantor, and may be waived by him. Such defence can not be made by his judgment creditors.

108	217
196	311
102	217
131	227
102	217
143	437
102	217
146	329
109	217
152	261
162	525

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PRACTICE.—*Joint Assignment of Error*.—A joint motion for a new trial, or a joint assignment of error, must be good as to all or it is not good as to any.

SAME.—*Attacking Complaint After Verdict*.—As to the rule to be applied when a complaint is assailed for the first time after verdict, see *Baltimore, etc., R. R. Co. v. Kreiger*, 90 Ind. 380, and *Stockwell v. State, ex rel.*, 101 Ind. 1, and cases there cited.

From the Hancock Circuit Court.

J. H. Mellett and *M. Marsh*, for appellants.

C. G. Offutt, for appellee.

ZOLLARS, J.—In January, 1877, one Charles T. Pauley was the owner, and in the possession of two tracts of land which he sold to appellee. After the sale and execution of the deed to her, one Bills recovered a judgment against Pauley, which, for value, he assigned to appellant Simmons. About the same time, Simmons and the other appellants, except the sheriff, recovered another judgment against Pauley. Executions were issued upon these judgments and placed in the hands of the sheriff, who levied them upon the lands, and, when this action was commenced, was threatening to sell. The facts are stated in the complaint, with the additional averment that the judgment purchased by Simmons had been paid. In the complaint, also, there is what is alleged to be a correct description of the lands by metes and bounds. The averments in relation to these lands, thus described in the complaint, and the description in the deed, are as follows: "And plaintiff avers that, on the said 30th day of January, 1877, she and the said Charles T. Pauley made and entered into a contract and agreement, whereby the said Pauley sold, covenanted and agreed to convey to the plaintiff the several tracts of real estate hereinbefore described; that then and there and thereupon the said Pauley made, executed, and delivered to the plaintiff his certain deed of conveyance, with good and sufficient covenants of general warranty, therein and thereby purposing and intending to convey to the plaintiff the real estate aforesaid, pursuant to the terms and con-

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ditions of their said contract in that behalf, so made as aforesaid. * * * And the plaintiff avers, that at the time of the execution and delivery of said deed of conveyance by the said Pauley to the plaintiff as aforesaid, it was then and there the understanding, intention and purpose of this plaintiff and of the said Pauley to include and describe therein each and both the said tracts or parcels of real estate as hereinbefore described, but that by the mutual oversight, inadvertence, and mistake of the plaintiff and the said Pauley, as also by the scrivener employed by them to draft the said deed of conveyance, the said real estate was therein mistakenly and erroneously described in this, to wit: That by the mutual oversight, inadvertence and mistake of the plaintiff and said Pauley, as also by the scrivener employed by them to draft the said deed of conveyance aforesaid, the said fifty-five-acre tract of real estate, being the tract or parcel thereof hereinbefore first described, was mistakenly and erroneously described in the said deed of conveyance as follows, to wit: The southwest part of the east half of the southwest quarter of section number eight, township seventeen north, range seven east. The words, 'southwest part,' being mistakenly and erroneously inserted and used in the said deed of conveyance instead of the words 'the west division,' which were omitted from the same, as were also the words and figures more particularly describing and bounding said real estate as hereinbefore contained, which said words, 'the west division,' and the words and figures more particularly describing and bounding said real estate as aforesaid, were and are a necessary and material part of the descriptive words thereof." Averments similar in character are made as to the other tract of land, it being described in the deed as "the middle division of the west half of the southwest quarter of section nine, township and range aforesaid, containing twenty-one acres more or less."

Appellee brought this action against Pauley, the execution plaintiffs, and the sheriff, to have the deed reformed by a cor-

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rection of the alleged mistake, to enjoin the threatened sale under the executions, and to have her title quieted. Pauley was defaulted, and has not appealed. The execution plaintiffs and the sheriff, who are appellants, assail the complaint for the first time by an assignment of error here, that it does not state sufficient facts to constitute a cause of action. Whatever might be thought of it, had the question been raised by a demurrer below, we think it very clear that it is good as against this assault after verdict. As to the rule to be applied when a complaint is assailed for the first time after verdict, see *Baltimore, etc., R. R. Co. v. Kreiger*, 90 Ind. 380, *Stockwell v. State, ex rel.*, 101 Ind. 1, and cases there cited; also R. S. 1881, sections 398, 658. It should be borne in mind, also, that Pauley, the grantor, has made no question as to the sufficiency of the complaint.

Appellants filed two answers; one a general denial, and the other that the conveyance to appellee was made and accepted with the fraudulent intent to cheat and defraud appellants, who were creditors of Pauley. In finding for appellee the jury found that the conveyance to her was *bona fide*. The court below refused to disturb that finding, and as the evidence clearly tends to sustain it, we can not overthrow it, and must regard it as an established fact.

Appellants contend further that the evidence is not such as to justify the verdict and judgment for a reformation of the deed as against them. Preliminary to a decision upon this question, it must first be determined what relation they sustain to the case. It is the settled law in this State, that judgment creditors are in no sense purchasers; that their judgments are simply general liens upon whatever interest the judgment defendants may have in the land, and that, hence, their rights do not stand in the way of the reformation of prior deeds and mortgages, nor in the way of the enforcement of equities as between the grantor and grantee. *White v. Wilson*, 6 Blackf. 448; *Sample v. Rowe*, 24 Ind. 208; *Flanders v. O'Brien*, 46 Ind. 284; *Busenbarke v. Ramey*, 53 Ind. 499;

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Glidewell v. Spaugh, 26 Ind. 319; *Wainwright v. Flanders*, 64 Ind. 306; *Monticello Hydraulic Co. v. Loughry*, 72 Ind. 562; *Sparks v. State Bank*, 7 Blackf. 469; *Orth v. Jennings*, 8 Blackf. 420.

It is settled, also, by the holdings in some of these cases, that a deed or mortgage will not be reformed as against a *bona fide* assignee of judgments.

In the case before us Simmons appears to be such assignee of the Bills judgment, but he has not so saved the question in the record as to put himself in a better position than the other appellants. The motion for a new trial and the assignment of errors are joint, he joining with the other appellants. Hence, if the motion should not be granted as to all, or if the assignment is not well made as to all, there was no error in overruling the motion, and the assignment can not be sustained. *Carver v. Carver*, 77 Ind. 498; *Feeney v. Mazelin*, 87 Ind. 226; *Robertson v. Garshwiler*, 81 Ind. 463.

As we have seen, Pauley made default; upon this default appellee was entitled to a judgment and decree against him for a reformation of the deed, and such decree was rendered. This decree settled the question that, unless there was fraud, Pauley had no interest in the land upon which appellant's judgments could rest as liens, and as thoroughly settled it as if there had been a trial of the question as between appellee and Pauley, or as if Pauley had come personally into court, admitted the mistake, and consented to the reformation:

There is no doubt that appellee purchased the land in controversy, and as the jury found, and we must now assume, purchased then for value and *bona fide*. Under her contract and deed, she was in possession of the land. Common honesty required that Pauley should not, upon technical and captious grounds, object to a reformation of the deed, so that appellee might have the lands which she had in good faith purchased from him. He has not made such objections, but by his default admitted the mistake in the description, and impliedly consented that it might be corrected. As to appel-

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lee, he thus consented that that might be done which common honesty and fair dealing required should be done. Who shall say that these parties shall not be allowed to do right simply because the mistake may have been one of law and not of fact? Whether the mistake ~~was~~ one of law or fact does not affect the moral obligation on the part of the grantor to do the honest and right thing. Morally, he may no more take something for nothing, because the mistake may have been one of law, than if it be one of fact. Surely, a court of equity, whose province it is to discover and enforce the right, will not intervene to prevent parties doing the right and equitable thing, unless superior equities in favor of other parties have intervened. Judgment creditors have no such superior equities. Their judgments are liens, subject to the superior equities of the prior grantee. It being established by the decree of the court, based upon the declaration of appellee, and the admissions and right conduct of Pauley, that the appellee, and not Pauley, owned the lands, appellants' judgments are not liens upon them. If the mistake in the description was, in truth, one of law, and not of fact, Pauley might have made that defence. But that defence, we think, was personal to him; one that he might and has waived, and that, having waived it, the judgment creditors are not in a condition to complain, nor make the defence for him. Neither can they make it in their own behalf. Such a defence is analogous to the defence of the statute of frauds, which is personal to the immediate parties, may be waived by them, and can not be made by third parties, though they be creditors of the vendor. *Morrison v. Collier*, 79 Ind. 417; *Dixon v. Duke*, 85 Ind. 434, and cases therein cited; *Cool v. Peters Box, etc., Co.*, 87 Ind. 531.

To allow these judgment creditors to resist the reformation of the deed upon the ground that the mistake in the description may have been one of law, and not of fact, would be to allow them to consummate and perpetuate a wrong upon appellee, to which Pauley, the grantor, declines to be a party.

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It would be to hold that parties to a conveyance of land may not act honestly when they wish. It would be lending the aid of a court of equity to enforce a wrong over the wish of the immediate parties to do right. Appellee having purchased the lands in good faith, and the grantor being willing that she shall have an honest and sufficient deed therefor, appellants, as simple judgment creditors of the grantor, may not stand in the way upon the single claim that the mistake in the description was one of law.

Having reached this conclusion, it is not necessary for us to decide whether the mistake was one of law or one of fact. This conclusion also makes it unnecessary to consider other questions discussed by counsel.

The judgment is affirmed with costs.

Filed June 20, 1885.

No. 12,219.

**FATOUT v. THE BOARD OF SCHOOL COMMISSIONERS OF THE
CITY OF INDIANAPOLIS ET AL.**

CITY.—School Commissioners in Cities of 30,000.—Powers of.—Statute Construed.—The 5th clause of section 4460, R. S. 1881, gives to boards of school commissioners in cities of 30,000 or more inhabitants, power to contract for the erection and completion of school-houses, and to agree to pay therefor partly in cash and partly on time, and to make and deliver their promissory notes for the deferred payments, which are valid obligations, and binding upon the school corporation, notwithstanding the fact that there may be at the time outstanding bonds to the amount of \$100,000, issued and sold under the 8th clause of said section, to secure loans in anticipation of the revenue, for building school-houses, and that such money had been disbursed for that purpose.

SAME.—Discretion of Commissioners.—The powers conferred upon such board by the 5th clause of section 4460 are limited only by the educational wants of the school corporation under the board's control, in the exercise of a sound and reasonable discretion.

SAME.—The 8th clause of section 4460, R. S. 1881, was not intended to be and is not a limitation upon the general powers conferred upon the board of school commissioners by the 5th clause of such section. It

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153	279
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confers additional and extraordinary power not conferred upon school corporations generally, and the proviso therein contained is a limitation only upon the board's exercise of such additional and extraordinary power.

SAME.—Promissory Notes.—Promissory notes executed by such board of school commissioners, in settlement of its just debts fairly contracted for the legitimate purposes of the school corporation, do not come within the purview of the 8th clause of section 4460, R. S. 1881, or of the proviso thereof.

MECHANIC'S LIEN.—School-House.—Public Policy.—A mechanic's lien for work done, or for materials furnished, in the erection of a public school-house, can not be acquired or enforced. *Shattell v. Woodward*, 17 Ind. 225, overruled.

From the Marion Superior Court.

A. C. Harris, W. H. Calkins, F. Rand and J. M. Winter,
for appellant.

R. B. Duncan, J. S. Duncan, C. W. Smith and J. R. Wilson,
for appellees.

HOWK, J.—In this case the appellant Fatout sued the appellees, the Board of School Commissioners of the City of Indianapolis and the City of Indianapolis, in a complaint of two paragraphs. In the first paragraph the appellant declared upon a written agreement, executed by and between himself and such board of school commissioners, on the 26th day of March, 1884, for the erection and completion by him of a certain school-house of eight rooms, within such city of Indianapolis, in accordance with certain plans and specifications, in consideration of which such board of school commissioners were to pay the appellant the sum of \$16,733 in cash, or, at their election, the sum of \$16,983, payable one-half in cash, as the work progressed, and the residue in the notes of such board, to be executed upon the completion and acceptance of the school-house, and payable, with five per cent. interest, on July 1st, 1886. After setting out such agreement, in the first paragraph of his complaint, Fatout then alleged that he had fully kept and performed all the covenants and conditions of such agreement, on his part to

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be kept and performed, and had fully erected and completed such school-house to the satisfaction and acceptance of such board of school commissioners; but that such board had not kept and performed all their covenants, mentioned in such agreement, in this, that they had only paid him the one-half part of each and all of the estimates of the amount due him for work done and materials furnished by him, under such agreement, made from time to time as the work progressed, and of the final estimate at the completion of such school-house, and had wholly failed to pay him the balance of the money due him on all such estimates, under such agreement. Fatout further alleged that, on the 5th day of November, 1884, and within sixty days after his completion of such school-house, he filed a mechanic's lien, in the recorder's office of Marion county, against the lots in the city of Indianapolis upon which such school-house was so erected by him, and against the school-house itself; which mechanic's lien was, on the same day, duly recorded in the proper record-book of such recorder's office. Fatout further alleged that the city of Indianapolis claimed to have some interest in the lots, upon which such school-house was so erected by him, but that if the city had any interest in such lots, it was junior to his mechanic's lien thereon. Wherefore he demanded judgment for \$12,000, for the enforcement of his mechanic's lien, and for all proper relief.

The second paragraph of Fatout's complaint was a common count, wherein he sought to recover, *quantum meruit*, for the work and labor done and the materials furnished by him, at the request of such board of school commissioners, in the erection and completion of the same school-house mentioned in the first paragraph of his complaint. In such second paragraph of complaint, Fatout alleged that the board of school commissioners undertook and promised to pay him for such work and materials what the same were reasonably worth; that such work and materials were reasonably worth

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the sum of \$19,000, whereof such board had only paid him the sum of \$8,491.50; and that the balance of the first-mentioned sum was then due and wholly unpaid. The second paragraph of complaint also contains substantially the same averments as the first paragraph, in regard to Fatout's mechanic's lien on the lots and school-house, and the interest, if any, claimed by the city of Indianapolis in such lots; and judgment was demanded for \$15,000, for the enforcement of the mechanic's lien, and for all proper relief.

The demurrers of the city of Indianapolis, for the want of sufficient facts, were sustained by the court at special term to each paragraph of complaint.

The board of school commissioners separately answered the first paragraph of the complaint, in four paragraphs, of which the first, a general denial, was subsequently withdrawn. Fatout replied to the second paragraph of such answer, in two special or affirmative paragraphs; to each of which the demurrers of the board of school commissioners, for the alleged insufficiency of the facts therein, were sustained by the court at special term, and to these rulings Fatout excepted. His demurrers to the third and fourth paragraphs of such answer were overruled by the court, and he excepted and refused to reply thereto.

To the second paragraph of complaint, the board of school commissioners separately answered in a single special paragraph; to which answer Fatout replied specially, in a single paragraph. The demurrer of the board of school commissioners to this reply, for the alleged insufficiency of the facts therein, was sustained by the court. Fatout excepted, and, refusing to amend or plead further, judgment was rendered against him for appellees' costs by the court at special term. From this judgment he appealed to the general term, and there assigned as errors each and all of the rulings of the court, at special term, adverse to him. The judgment at special term was affirmed by the general term. From the judgment of the general term, Fatout prosecutes this appeal,

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and, by a proper assignment of error, has brought before this court all the errors assigned by him in general term.

Appellant's counsel say, in their brief: "The record presents but two questions, and each of these questions is presented by several rulings in special term." The first question discussed by counsel is fairly presented, we think, by the alleged error of the court in sustaining the demurrer to appellant's reply to the second paragraph of the separate answer of the board of school commissioners to the first paragraph of complaint; and we will consider and decide this question, as thus presented.

In the second paragraph of its answer to the first paragraph of complaint, the board of school commissioners admitted the execution of the agreement, set out in the first paragraph of complaint, as therein alleged, and that Fatout had built the school-house under and in accordance with the stipulations of such agreement; and the board averred that, at and before the time the first estimate was made and payment thereon became due to Fatout, such board not having the cash necessary to pay the contract price, and not having the prospect of such cash nor the ability to raise the same before July 1st, 1886, elected and determined to pay for such work at the price stipulated therefor, upon the plan of half cash and half in notes, namely, the sum of \$16,983; that, in pursuance of such plan, such board did, from time to time, as such estimates were made, pay to Fatout who, from time to time, received the same, one-half in cash of each of such estimates, all of which payments were made before the commencement of this suit, except the final estimate, for which the board was always ready and willing to pay, in like manner, after it became due, and did pay one-half cash when Fatout called for it, three days after he commenced this suit; that, in further compliance with the terms of such agreement, on its part to be kept and performed, the board of school commissioners had been and was, at all times, ready, willing and offering to give Fatout its notes for the residue

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of the contract price for such school-house, payable with five per cent. interest on July 1st, 1886; and that such board had in fact made, signed and tendered its notes to Fatout, in compliance with its part of such agreement, but he had refused to accept such notes.

Fatout's reply to this answer was in two paragraphs, but in neither of them did he controvert any of the facts upon which the board of school commissioners rests its defence to his action, namely, that the board had fully paid Fatout in cash the one-half of the contract price for the completion and erection of the school-house, and that, for the residue of such price, it had made, signed and tendered its notes to him in substantial compliance with its part of the agreement sued upon. In his reply, Fatout claims that he is not bound to accept the notes of the board of school commissioners, because such notes were at all times null and void, and were made and tendered by the board without any authority whatever of law therefor. The board's notes are claimed by Fatout to be invalid, null and void, for two reasons, each of which is stated in a separate paragraph of reply; and we will separately consider and pass upon the sufficiency of these two replies.

In his first special reply, Fatout alleged that the notes of the board of school commissioners, made and tendered to him, were invalid and void, because, he said, such board was created, organized and existed solely under the provisions of an act of the General Assembly of this State, entitled, "An act providing for a general system of common schools in all cities of thirty thousand or more inhabitants, and for the election of a board of school commissioners for such cities, and defining their duties and prescribing their powers, and providing for common school libraries within such cities," approved March 3d, 1871 (sections 4457 to 4463, R. S. 1881); that, by the *eighth* clause of section 4460, R. S. 1881, in the above entitled act, such board was authorized "To prepare, issue, and sell bonds to secure loans, not exceed-

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ing in the aggregate the sum of one hundred thousand dollars, in anticipation of the revenue, for building school-houses, to bear such rate of interest, not exceeding ten per cent. per annum, and payable at such time, within five years from date, as the board may determine; and the money obtained as a loan on any such bonds shall be disbursed by order of such board, in payment of expenses incurred in building school-houses: *Provided*, That until all the bonds of any one issue shall have been redeemed, such board shall not be authorized to make another issue; nor shall any such bonds be sold at a less rate than ninety-five cents on the dollar."

And the appellant averred that, long before the execution of the agreement sued upon, the board of school commissioners, in execution of the authority so conferred upon it by the statute, prepared, issued and sold its bonds to secure loans aggregating the full sum of \$100,000, in anticipation of its revenue, for building school-houses, payable five years after date and bearing six per cent. interest; that the money so obtained was, before the making of the agreement now in suit, disbursed upon the order of such board in payment of expenses incurred in building school-houses within the limits of the city of Indianapolis; that all such bonds were and had been at all times since the issue and sale thereof, and still were, outstanding and wholly unpaid; and so the appellant said that, at the time of the making of the agreement described in his complaint, and at all times since, such board of school commissioners had been and was prohibited by law from issuing any further note or bond to pay for the building of school-houses within the limits of such city, and that the notes and obligations of such board, provided for in such agreement and mentioned in its second paragraph of answer, were therefore null and void, and the appellant was not required to accept the same in payment and satisfaction of his debt. Wherefore, etc.

This paragraph of Fatout's reply proceeds upon the theory that the *eighth* clause above quoted of section 4460, R. S.

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1881, is a limitation upon the power or authority of the board of school commissioners to build school-houses within its territorial jurisdiction, wholly or partially upon credit. This view of the statutory power or authority of such board, in the erection of school-houses, it seems to us, is not warranted by the provisions of the statute. By the *fifth* clause of section 4460, such board of school commissioners is expressly authorized "To purchase grounds, construct school buildings, purchase supplies, employ and pay teachers, appoint superintendents, and disburse, through the treasurer of the board of school commissioners, moneys for all school and library expenses." The powers conferred upon such board, by this clause of the statute, are limited only by the educational wants of the school corporation, under the board's control, in the exercise of a sound and reasonable discretion. In section 8 of the above entitled act of March 3d, 1871, section 4463, R. S. 1881, it is provided that "All parts of the general school laws of this State, not inconsistent herewith, and which may be applicable to the general system of common schools in such city, herein provided for, shall be in full force and effect in such city." Construing the provisions of the above entitled act of March 3d, 1871, in connection with section 4438, R. S. 1881, in force since March 6th, 1865, the city of Indianapolis is "a distinct municipal corporation for school purposes, by the name and style" of the Board of School Commissioners of the City of Indianapolis, "and by such name may contract and be contracted with, sue and be sued, in any court having competent jurisdiction."

The board of school commissioners had the power, therefore, under the *fifth* clause of section 4460, to contract with Fatout for the erection and completion of the school-house, mentioned in the agreement sued upon; and it might agree to pay him therefor, partly in cash and partly on time. For the deferred payments, the board might lawfully make and deliver its promissory notes; and such notes executed to Fatout, upon such consideration, would be valid obligations

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and binding upon the school corporation. *Sheffield School Tp. v. Address*, 56 Ind. 157; *School Town of Monticello v. Kendall*, 72 Ind. 91 (37 Am. R. 139); *Wallis v. Johnson School Tp.*, 75 Ind. 368; *Johnson School Tp. v. Citizens Bank, &c.*, 81 Ind. 515.

The *eighth* clause of section 4460, as we construe its provisions, was not intended by the General Assembly as a limitation upon the general powers conferred upon the board of school commissioners by the *fifth* clause of such section. *Miller v. White River School Tp.*, 101 Ind. 503. On the contrary, we think it was the manifest intention of the Legislature, in and by the *eighth* clause of such section, to give such board of school commissioners an additional and extraordinary power, not conferred upon school corporations generally; and that the *proviso* in such *eighth* clause is, and was intended to be, a limitation only upon the board's exercise of such additional and extraordinary power. We are of opinion that promissory notes, executed by the board of school commissioners in settlement of its just debts, fairly contracted for the legitimate purposes of the school corporation, do not come within the purview of the *eighth* clause of section 4460, R. S. 1881, or of the *proviso* therein. We conclude, therefore, that the court did not err in sustaining the demurrer to the first special reply of Fatout to the second paragraph of the board's separate answer.

The error assigned by Fatout to the sustaining of a demurrer to his second special reply to the second paragraph of the board's answer to the first paragraph of his complaint is not discussed here by his counsel, and is, therefore, regarded as waived.

One other question, presented by the record and discussed by the counsel of the appellees as well as of the appellant, may be thus stated: Can a mechanic's lien be acquired or enforced, either for work done or for materials furnished in the erection of a public school-house? We are of opinion that this question must be answered in the negative. It is true

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that the mechanic's lien law of this State contains no exceptions, and is broad enough in its provisions to admit of the acquisition and enforcement of such a lien against a public school-house. It is true, also, that in *Shattell v. Woodward*, 17 Ind. 225, it was held by this court that a mechanic's lien could be enforced, under our statute, for work done and materials furnished in the erection of a school-house built by order and contract of a township trustee. It is manifest from the opinion in the case cited, that the question was not carefully considered; for the decision is rested wholly upon the general language of the statute, without the citation of a single authority. Notwithstanding the broad and comprehensive provisions of the mechanic's lien law, it was held by this court, in the recent case of *Board, etc., v. O'Conner*, 86 Ind. 531 (44 Am. R. 338), that a mechanic's lien could neither be acquired nor enforced against the court-house and public offices of a county, in this State. The court there said: "In the mechanics' lien law of this State there is no provision to the effect that such a lien may be acquired or enforced upon or against public property held for public use; and, in the absence of such a provision, we must hold, in conformity with the weight of authority elsewhere, that such a lien can neither be acquired nor enforced upon or against such property held for such use."

The doctrine of the case last cited is decisive, as it seems to us, of the question we are now considering, adversely to the validity of the mechanic's lien which Fatout claims to have acquired, and is seeking to enforce upon and against the public school-house erected by him, in the case in hand. For there is no public property held for a more sacred public use than a public school-house of a public school corporation, under the Constitution and laws of this State. See, also, the cases of *Board, etc., v. Norrington*, 82 Ind. 190, and *Lowe v. Board, etc.*, 94 Ind. 553.

The case of *Shattell v. Woodward, supra*, is overruled.

Quarl v. Abbett.

We have found no error, in the record of this cause, which authorizes or requires the reversal of the judgment below.

The judgment is affirmed, with costs.

Filed May 26, 1885.

No. 9529.

QUARL v. ABBETT.

JURISDICTION.—*Constructive Notice.*—*Personal Judgment.*—A personal judgment is one which binds the judgment defendant personally and creates a lien upon his property generally; such a judgment can not be rendered where the notice of the action is by publication.

SAME.—*Presumption of Notice.*—Where a judgment is collaterally attacked and the record is silent as to notice, the presumption is that notice was given, and this rule applies to cases of constructive as well as to cases of actual notice.

SAME.—*Fraudulent Transfer of Property.*—*Shares of Stock in Corporation.*—A judgment setting aside a fraudulent transfer of shares in the capital stock of a corporation may be rendered upon a notice by publication.

SAME.—*Non-Residents.*—The process of a court of this State may operate upon personal property within the territorial limits of the State, although the owner is a resident of another State, and can only be given constructive notice.

SAME.—*Capital Stock of Corporation.*—Shares of capital stock in a private corporation are property, and may be reached by attachment.

SAME.—*Attachment.*—The issuing of a writ of attachment, and the levying thereof on shares of the capital stock of a corporation transferred for the purpose of defrauding creditors, brings the property within the jurisdiction of the court out of which the writ issued.

SAME.—*Authority to Try Questions of Fact upon Constructive Notice.*—*Fraud.*—Although fraud is a question of fact, still, it may be tried, where the property sought to be reached is within the jurisdiction of the court, upon constructive notice given to a non-resident defendant.

SAME.—*What is Jurisdiction.*—The authority to hear and determine a cause is jurisdiction to try and determine all the questions involved in the controversy.

SAME.—*Attachment.*—The authority to determine whether property seized under a writ of attachment is subject to the writ includes the authority to ascertain and find the amount due the attaching creditor.

NOTICE BY PUBLICATION.—*Defective Notice.*—*Judgment.*—Where there is

109 233
124 586
135 412
136 475
137 200

102 233
138 388
139 147

102 233
130 36

102 233
131 588
132 484
133 426

102 233
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136 213
136 578

102 233
143 484

102 233
153 9

102 233
155 388

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some notice, although defective, the judgment is not void, even where the notice is by publication.

EQUITY.—*Fraudulent Transfer of Property.*—*Creditor not Bound to Obtain Judgment Before Suing to Set Aside Transfer.*—A creditor is not bound to put his debt in judgment before suing to set aside a transfer of property made for the purpose of defrauding him.

SAME.—*Attachment.*—A creditor may maintain a suit to set aside a fraudulent transfer of the capital stock of a corporation although an attachment has been levied thereon.

SAME.—*Lien of Writ.*—*Removal of Impediments to Lien.*—Where property is within the jurisdiction of the court, a suit may be maintained in conjunction with the attachment proceedings to remove impediments to the lien and to make it perfect.

From the Marion Superior Court.

A. B. Young, H. W. Harrington and A. G. Howe, for appellant.

R. Hill and J. W. Nichol, for appellee.

ELLIOTT, J.—The material facts stated in the complaint of the appellee are these: Vincent A. Quarl and Samuel Lefevre are non-residents of the State, and the latter endorsed to the appellee two promissory notes, executed by Bledsoe and others to the appellee. At the time the notes matured the makers were insolvent, and so remained. At the time of the endorsement made by him, Lefevre owed debts amounting to ten thousand dollars, and was the owner of twenty-four shares of the capital stock of a corporation known as the Indiana Chair Manufacturing Company, and to cheat and defraud his creditors, entered into a conspiracy with Quarl, and, pursuant to the fraudulent purpose, did transfer and assign all of the stock to Quarl on the books of the company, which transfer was accepted with full knowledge of the assignor's fraudulent intent. Nothing was paid by Quarl for the stock, and he appears on the books of the corporation to be the owner. The prayer is that the court will ascertain the amount due the plaintiff, adjudge the transfer of the stock to be fraudulent, and decree that the property be sold as on execution to satisfy appellee's claim. Concurrently with the complaint, the

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appellee filed an affidavit reading thus: "Said plaintiff says he has a good and valid cause of action against Samuel Lefevre and Vincent A. Quarl, which, as to said Lefevre, is founded upon the endorsement to this plaintiff of certain promissory notes, and, as to said Lefevre and Quarl jointly, is founded upon the fraudulent transfer to said Lefevre of certain property more particularly described in the complaint in this cause, which transfer grows out of and is connected with the endorsement of said notes by the said Lefevre to this plaintiff. And he further says that said defendants, Lefevre and Quarl, are non-residents of the State of Indiana."

An affidavit and undertaking in attachment were also filed, and the writ issued at the suit of the appellee was levied on the stock standing in the name of Quarl on the books of the company. The complaint and affidavit for publication were filed on the 17th day of April, 1878. On the 11th day of June, 1878, proof of publication of notice was made. The notice reads as follows:

"Oliver H. P. Abbett v. Samuel L. Lefevre, V. Augustus Quarl, Indianapolis Chair Manufacturing Company.

"No. 21,993. Room 4. April Term, 1878.

"Be it known, that on the 17th day of April, 1878, the above named plaintiff, by his attorneys, filed in the office of the clerk of the Superior Court of Marion county, in the State of Indiana, his complaint against the above named defendants for attachment, and that on the said 17th day of April, 1878, the said plaintiff filed in the said clerk's office the affidavit of a competent person showing that said defendants, Samuel L. Lefevre and V. Augustus Quarl, are not residents of the State of Indiana. Now, therefore, by order of said court, said defendants last above named are hereby notified of the filing and pending of said complaint against them, and that unless they appear and answer or demur thereto at the calling of said cause on the second day of the term of said court, to be begun and held at the court-house, in the city of Indianapolis, on the first Monday in June, 1878, said com-

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plaint and the matters and things therein contained and alleged will be heard and determined in their absence.

"AUSTIN H. BROWN, Clerk."

On the day last named the cause was submitted to the court and a finding and judgment entered in favor of the appellee. In December, 1879, Quarl appeared and filed a motion to open the judgment, and his motion was sustained. On the 3d day of January, 1880, he filed an answer of general denial, and on the first day of the following July, the cause was, by agreement, submitted to the court for trial. The trial resulted in a finding and judgment for the appellee. In September, 1880, a motion for a new trial was overruled, appeal was taken to the general term, and the judgment of the special term affirmed on the 2d day of May, 1881.

The appellant contends that no jurisdiction of the person of the defendants was obtained, and, therefore, no personal judgment could be rendered. We concur with counsel that no personal judgment can be rendered in a case where there is constructive service, but we can not concur in the conclusion which is deduced from this proposition. It does not follow that property fraudulently transferred may not be reached and subjected to sale in an action commenced by publication. A personal judgment is one which binds the defendant; while a judgment which operates upon property is, in its essential features, a judgment *in rem*. Such a judgment creates no personal liability, but operates upon the particular property which constitutes the subject of litigation. A judgment operating solely upon property can not be made the foundation of an action against the defendant; nevertheless it may effectively operate upon the particular property within the jurisdiction of the court. If the appellant is right, then a citizen of Indiana can never reach property within our jurisdiction, if it is claimed by a non-resident. If the appellant is correct, then our statutory provisions providing for attachments against non-resident debtors is absolutely null, for in every case it is necessary to ascertain the amount

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of the debt in order to make a proper order of sale; and this proves his argument to be unsound.

It is a general principle that the process of the courts may reach and seize property within their jurisdiction. A man who brings property within the territorial jurisdiction of a State subjects it to the laws of that State. "If a foreigner or citizen of another State," says an able court, "send his property within a jurisdiction different from that where he resides, he impliedly submits it to the rules and regulations in force in the country where he places it. What the law protects, it has the right to regulate." *Clark v. Tarbell*, 58 N. H. 88. This general doctrine has been declared by other courts, among them our own. *Ames Iron Works v. Warren*, 76 Ind. 512; *Green v. VanBuskirk*, 7 Wall. 139; *Rice v. Courtis*, 32 Vt. 460. It is upon this general principle that our statutory provisions relative to notice by publication are founded. If property of a non-resident can not be reached by legal process upon constructive notice, then our statutes were passed in vain and are mere empty legislative declarations, without either force or meaning; for, if the person is not within the jurisdiction of the court, no personal judgment can be rendered, and if the judgment can not operate upon the property, then no effective judgment at all can be rendered, so that the result would be that the courts would be powerless to assist a citizen against a non-resident. Such a result would be a deplorable one. If the rule were that which appellant's argument asserts, a citizen with a chattel mortgage could not enforce it on property within our borders against a non-resident, nor could a creditor enforce a claim against a man who had fled to Canada and made it his residence, although he had abundance of property within the State. Nor, if the rule were as asserted, could property of non-resident corporations within our limits be reached. But the rule is not as contended for; property within our jurisdiction may be seized upon process issued upon constructive notice. This has been often decided with respect to attachment proceed-

ings. Judge Story says: "Sometimes the seizure or attachment is purely nominal, as, for example, of a chip, or a cane, or a hat. In other cases the seizure or attachment is *bona fide* of real property or personal property within the territory, or of debts due to the non-resident persons in the hands of their debtors who live within the country. In such cases, for all the purposes of the suit, the existence of the property so seized or attached within the territory constitutes a just ground of proceeding to enforce the rights of the plaintiff to the extent of subjecting such property to execution upon the decree or judgment." Story Conf. Laws, section 549. Wharton says: "But when the thing is situate within the jurisdiction of the court, then proceedings *in rem* give a title to it against all the world." Wharton Conf. Law, section 829. He applies this doctrine to the seizure of goods under a writ of attachment, and cites *Ewer v. Coffin*, 1 Cush. 23; *Phelps v. Holker*, 1 Dall. 261; *Pawling v. Bird*, 13 Johns. 192; *Arndt v. Arndt*, 15 Ohio, 33; *McVicker v. Beedy*, 31 Maine, 314; *Bissell v. Briggs*, 9 Mass. 462.

Freeman says: "Proceedings by attachment are not, strictly speaking, *in rem*, and yet they are sometimes so spoken of; and in some respects their effect is more, and in others less comprehensive than the effect of proceedings *in personam*. Thus, by the seizure of the property, as where moneys are garnished, jurisdiction is acquired over the fund, so that orders may be made for its distribution or payment which will bind the owner, though he has not appeared nor been personally summoned in the case, provided such owner is in law or in fact a defendant in the action." Freeman Judg., section 607a. The Supreme Court of the United States, in speaking of notice by publication, says: "Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a pub-

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lic purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem*." *Pennoyer v. Neff*, 95 U. S. 714, 727. The issuing of the writ and the levy by the sheriff brought the property within the jurisdiction of the court. But we need not stop at this point, for the power to issue a writ, effective to seize the property, was jurisdiction. It is well settled that authority to move in a cause, even to determine that there is authority, is jurisdiction. *Lantz v. Maffett*, ante, p. 23; *Snelson v. State, ex rel.*, 16 Ind. 29; *Board, etc., v. Markle*, 46 Ind. 96; *Rhode Island v. Massachusetts*, 12 Peters, 657. There was, therefore, jurisdiction of the subject of the action, and the notice, under the provisions of the statute providing for notice by publication, gave jurisdiction of the person so far as necessary to determine the rights of the litigants in the particular property within the jurisdiction of the court.

It is said by appellant's counsel, that fraud is a question of fact, and, therefore, that such a question can not be tried upon constructive notice. This position is not tenable. Any question affecting the status of the specific property within the jurisdiction of the court and the rights of the parties in the property may be tried. The purpose of notice by publication is to give the best notice practicable to non-resident defendants, and thus enable the court to fully decide the controversy respecting property within its jurisdiction, no matter what form the question may assume. If this be not true, then in attachment proceedings fraud could never be shown where non-residents were parties, and that this can not be true is too clear to admit of debate.

The authority to hear and determine a cause is jurisdiction to try and decide all of the questions involved in the controversy. This principle is an ancient one, and even in the time when the contest between the chancery courts and the common law courts was hot and angry, it was recognized and enforced. Where the jurisdiction of the court once attaches it extends over the whole case, and the court will determine all

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questions necessary to a full adjudication of the controversy. *Field v. Holzman*, 93 Ind. 205; *Carmichael v. Adams*, 91 Ind. 526; 1 Pomeroy Eq. Juris., section 231. The authority to determine whether property is subject to a lien, or liable to be seized under a writ of attachment, or liable to be applied to the payment of the claims of creditors, necessarily confers jurisdiction to determine the amount of the indebtedness, for, in almost every case, the court must ascertain the indebtedness. Thus, in an action to foreclose a mortgage, the court must ascertain the amount of the indebtedness, so, in an action to enforce a claim against property fraudulently conveyed, the amount of the debt must be ascertained, and so, in attachment proceedings, the amount of the indebtedness must be ascertained in order to make the proper order for the sale of the attached property. In such cases the court, in ascertaining the amount due, does not proceed against the person, but simply ascertains the amount that shall be adjudged a lien on the property, or that shall measure the extent of the creditor's claim against it. The statement of the amount in the finding and decree of the court in such cases is not a personal judgment, but is a mere statement of a finding upon one of the questions in the case.

Where there is some notice, although defective, the judgment is not void; if there is notice, although irregular and defective, there is jurisdiction. *Brown v. Goble*, 97 Ind. 86, auth. p. 89; *City of Terre Haute v. Beach*, 96 Ind. 143; *McCormick v. Webster*, 89 Ind. 105; *Oppenheim v. Pittsburgh, etc., R. W. Co.*, 85 Ind. 471; *Stout v. Woods*, 79 Ind. 108; *McAlpine v. Sweetser*, 76 Ind. 78; *Hume v. Conduitt*, 76 Ind. 598; *Muncey v. Joest*, 74 Ind. 409; *Morrow v. Weed*, 4 Iowa, 77; *Smith v. Engle*, 44 Iowa, 265; *Ballinger v. Tarbell*, 16 Iowa, 491; *Freeman Judg.*, section 126. The rule with respect to notice by publication is the same as to notice by service of summons; there is, indeed, reason for being more liberal in cases of constructive notice than in cases where the service is by summons, for the defendant in the former class of cases is entitled, as

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of right, to open the judgment and try the cause. It is a mistake to suppose that notice by publication is purely of statutory origin, for it was well known in chancery and at common law. 3 Blackstone Com. 283, 444; *Hahn v. Kelly*, 34 Cal. 391. There is, therefore, no valid reason why the same presumptions should not obtain in cases where the notice is by publication as where it is by service of summons, and the weight of authority is to that effect. *Nash v. Church*, 10 Wis. 244; *Gemmell v. Rice*, 13 Minn. 400; *Newcomb v. Newcomb*, 13 Bush, 544; *Lawler v. White*, 27 Texas, 250. In the recent case of *Dowell v. Lahr*, 97 Ind. 146, it was held, after full consideration, that the presumption was in favor of the validity of the judgment of the court, and that it could not be shown in a collateral attack that the notice, although by publication, was insufficient or irregular, and this decision is supported by the cases to which we have here referred and by other cases in our own reports. The notice in this case, therefore, conferred jurisdiction against Lefevre and the judgment against him can not be collaterally impeached. The appellant appeared and answered without questioning the jurisdiction, and, as to him, there was certainly jurisdiction, so that the judgment, as the record presents it to us, appears to have been rendered in a cause where the court had plenary jurisdiction. This is so because Lefevre can not and does not attack it, and the appellant has waived all questions of that character. Quarl is protected by the judgment as against any claim Lefevre might have, because, as expressly decided in *Dowell v. Lahr*, *supra*, Lefevre can not collaterally attack the judgment, and as to him it was not opened. So far as concerns the rights of the appellant, they were tried upon the issue tendered by his answer, and he, of course, can not now assert that there was no jurisdiction of his person, at least, in so far as concerned the property described in the complaint and seized under the writ of attachment. *Cool v. Peters Box, &c., Co.*, 87 Ind. 531.

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The rule that obtained in chancery under the old system, requiring a judgment and an execution to be secured by the creditor before resorting to equitable relief, is invoked by appellant, and we are referred to many cases. Doubtless the general rule was as stated by counsel; whether it prevails under the reformed system of procedure is quite another question; but, without stopping just now to decide that question, and, for the present, granting that the rule does prevail, still it never did govern such a case as this—manifestly it could not apply—for against a non-resident the creditor could not possibly obtain a personal judgment. It is hardly necessary to cite authorities to prove that two notable exceptions to the rule were, where the debtor was dead or “beyond seas.” *Kipper v. Glancey*, 2 Blackf. 356.

The case of *Scott v. Indianapolis Wagon Works*, 48 Ind. 75, decides, and rightly decides, that a creditor may maintain a bill against a debtor and his assignee to set aside a fraudulent transfer of the capital stock of a corporation. If that case stands it rules here, and not only do we feel bound to adhere to it upon the principle of *stare decisis*, but for the further reason that it asserts the true doctrine. We can conceive no reason why a fraudulent sale of capital stock in a corporation may not be declared void and the stock made liable to the claims of the creditors of the assignor. Stock is property, and the policy of the law is to enable creditors to make their debts out of the property of the debtor. What imaginable equity is there in allowing a fraudulent assignee to hold stock as against creditors? The property is of a peculiar nature, and when, as in this instance, transferred on the books of the company, it can be most effectively reached by a decree of court setting the transfer aside and subjecting the stock to the claim of the creditor. A recent writer says: “The tendency of the authorities is to reclaim every species of the debtor’s property, prospective or contingent, for the creditor. As has been seen, transfers of intangible rights and choses in action, such as stocks, annuities, life insurance policies, book roy-

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alties, patent rights, legacies, and choses in action generally, may be reached." Wait Fraud. Conv. 24. If the stock had remained in the name of the debtor, it could have been levied on by ordinary legal process, and it is, as another author says, the rule that, "whenever a statute enables a creditor to reach such property, either by attachment or execution, a transfer of it becomes liable to investigation on the ground of fraud." Bump Fraud. Conv., section 239. Equity will always aid the law, and here equity assistance is required to fully adjudicate upon the rights of the parties and completely protect the rights of the creditors. If the stock had remained in the name of Lefevre, then, perhaps, the writ of attachment would have accomplished all that was necessary, but it was in the name of the fraudulent assignee, and the creditor had a right to have this fraudulent assignee's colorable title overthrown and all questions of ownership settled, so that ultimately his rights might be fully vindicated.

Suits to set aside fraudulent transfers of property are properly of equitable cognizance. This doctrine we have explicitly affirmed by our decisions, that such suits must be tried by the court, and not by a jury. *Hendricks v. Frank*, 86 Ind. 278; *Evans v. Nealis*, 87 Ind. 262. But, under our code, we have only one form of action and one tribunal, and while there may be issues in the same action of an equitable and legal nature, there is only one court for their trial, and hence they may be embraced in one action. We have, under this principle, held that a plaintiff may have an attachment and may also foreclose a mortgage. *Martin v. Holland*, 87 Ind. 105. Upon a like principle, it must be held that an attachment may issue in an action brought to set aside a fraudulent conveyance and subject to sale property fraudulently conveyed. It is, indeed, impossible to conceive how it could be otherwise, since there is but one court, and parties are required, wherever practicable, to settle the entire controversy in one action. We have many cases recognizing and enforcing this principle, among them *Field v. Holzman*, *supra*, *Frank*

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v. *Kessler*, 30 Ind. 8, *Lindley v. Cross*, 31 Ind. 106. It is held in these cases that an action may be maintained to obtain judgment on a claim and also to set aside a fraudulent conveyance, and this is the principle which governs here. As the appellee had a right to an attachment, and a right to have the fraudulent transfer set aside, his proceedings were well brought, and as the court had general jurisdiction of such subjects, and as notice was given as provided by statute, the judgment was proper. The description of the property in the complaint brought the matter within the jurisdiction of the court; the notice by publication brought Lefevre into court as to that property, and the appellant, having been notified and having appeared without objecting to the process, is bound by that judgment.

Counsel cite *Griffin v. Nitcher*, 57 Maine, 270, *Tennent v. Batley*, 18 Kan. 324, *Weil v. Lankins*, 3 Neb. 384, *Bigelow v. Andress*, 31 Ill. 322, *Martin v. Michael*, 23 Mo. 50, *McMinn v. Whelan*, 27 Cal. 300, *Wiggins v. Armstrong*, 2 Johns. Ch. 144, *Dunlevy v. Tallmadge*, 32 N. Y. 457, *Jones v. Green*, 1 Wall. 330, and *Harrell v. Whitman*, 19 Ala. 135, and we have examined them but find them not in point. They declare the general rule, which prevailed under the old system, that only judgment creditors can maintain a suit to set aside a fraudulent conveyance, and as our law is different, the cases cited are not applicable. But even under the old system the rule was a general one to which there were, as we have seen, notable exceptions. It is clear that there must be exceptions, for no rule can be sound which requires a creditor to obtain a judgment *in personam* where there can be no jurisdiction of the person, since that would be to require him to do an impossible thing. If a personal judgment can not be obtained, then the creditor must be permitted to resort to the only remedy open to him, a proceeding against the property. The case before us comes within another exception to the general rule, for it is a proceeding in aid of a legal writ and essential to secure a complete adjustment of the rights of the

parties. Bump Fraud. Con. 239; *Greenleaf v. Mumford*, 50 Barb. 543; *Mills v. Block*, 30 Barb. 549; *Rinchey v. Stryker*, 26 How. Pr. 75; *Falconer v. Freeman*, 4 Sandf. Ch. 565; *Kelly v. Lane*, 42 Barb. 594. But we need not stop to consider the rule under the old system, for our statute and our decisions fully and explicitly recognize the right of a general creditor to set aside a fraudulent transfer of property.

Our statute and our decisions have long established the rule that property fraudulently conveyed may be levied on, and if this be true, as unquestionably it is, then it is subject to attachment. *Hankins v. Ingols*, 4 Blackf. 35; *Herman Ex.* 147, section 17.

Fraudulent transfers are void as to creditors when properly assailed, and if void, of course the thing transferred may be seized as the property of the assignor. *Sanders v. Muegge*, 91 Ind. 214. As said in the case cited: "But when the creditor elects in any manner provided by law to avoid the fraudulent conveyance, then such conveyance, as to him, is the same as though it had never had an existence." The text-writers affirm that property fraudulently transferred may be attached. One of them says: "The simulated sale of land or other property, though accompanied by delivery, would not prevent its lawful attachment as the property of the fraudulent grantor." *Waples Attachment*, 154. Another author says: "A transfer made to hinder, delay, or defraud creditors, as to such creditors, passes no title whatever; the property covered thereby may be attached in the hands of the transferee for the debts of assignor, and afterwards sold under execution." *Kneeland Attachment*, section 334. As the property is subject to attachment, the writ becomes a lien and equity may interpose to remove impediments and make the lien perfect. This is the ruling of the best reasoned cases, where the defendants are non-residents, even under the old system, and certainly must be the rule under our system. *Hunt v. Field*, 1 Stockton N. J. 36; *Sheafe v. Sheafe*, 40 N. H. 516; *Ward v. McKenzie*, 33 Texas, 297; *Pendleton v. Perkins*, 49 Mo. 565; *Scott v.*

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McMillen, 1 Littell (Ky.) 302. The reasoning in the case last cited is strong and satisfactory and commends itself to our minds as it did to the minds of the court in *Kipper v. Glancey*, *supra*, where it was said by BLACKFORD, J., in delivering the opinion of the court: "Where the debtor has absconded, the practice should be the same as in the cases to which we have referred. By absconding from the State, the debtor prevents the proceeding against him at law, and his creditors should be permitted to apply to a court of chancery, as where judgments have been previously obtained, or the debtor is deceased."

If the question were an open one, we should not be inclined to yield to the New York decisions so earnestly pressed upon us by counsel, for we regard them as unsound in principle and unsupported by well grounded authority; and we, moreover, find that the decisions in that State are in hopeless conflict. The right of a creditor to invoke assistance in a case like the present was held in one of the cases to be perfectly clear, the judge who delivered the opinion saying: "Since the decision in *Rinchey v. Stryker*, I consider it no longer an open question, whether, when an attachment is issued under the code of procedure, the plaintiff in the action obtains such a lien on the property attached as will entitle him to the intervention of the equitable jurisdiction of the court to remove or set aside all fraudulent claims and transfers, or any other fraudulent obstacles, in the way of the realization of the lien, in case the plaintiff should recover a judgment." *Greenleaf v. Mumford*, 30 How. Pr. 30. The decision of the court is supported by the decisions of that State, and the remarks quoted are abundantly justified, although since that time a departure has apparently been taken. *Rinchey v. Stryker*, 28 N. Y. 45; *Kelly v. Lane*, 42 Barb. 594; *Thurber v. Blanck*, 50 N. Y. 80, see p. 86.

The rule which prevails with us gives a direct road to the end of the controversy, enables a citizen to proceed against the property of a non-resident debtor, while any other pro-

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duces a multiplicity of actions, and in many instances would make it utterly impossible to reach the property of a non-resident debtor, and would, practically, nullify our statute providing for notifying non-residents by publication. A rule such as appellant contends for would make it useless to invoke the aid of a court of equity in any case of this character, for, if the plaintiff had personal judgment, his legal process would accomplish all that he could ask; if his legal process could not do this, then, according to appellant's theory, he is remediless.

We need only say of the other questions presented by the appellant, that they arise upon an erroneous view of the record.

Judgment affirmed.

Filed June 9, 1885.

No. 12,261.

THE STATE v. JOHNSON.

CRIMINAL LAW.—*Involuntary Manslaughter.*—*Assault and Battery.*—An unlawful assault and battery without a purpose to kill, even where danger to life or serious bodily harm would not be the probable result of the violence, but which does, nevertheless, result in death, is involuntary manslaughter. R. S. 1881, section 1908.

From the Porter Circuit Court.

F. T. Hord, Attorney General, *E. D. Crumpacker*, Prosecuting Attorney, and *A. D. Bartholomew*, for the State.

W. Johnston and *W. Pagin*, for appellee.

MITCHELL, C. J.—On the trial of the appellee upon an indictment for involuntary manslaughter, the evidence showed that on the 16th day of August, 1884, he and one Carbon met in a saloon in Valparaiso, Indiana; that the appellee, without cause or provocation, knocked Carbon down, seized and threw him through a screen door, Carbon falling on his back with his feet over the door sill. Some time during the

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165	463

102	247
167	329

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course of the assault thus made upon him, Carbon received a wound which lacerated the flesh and exposed the bones of one of his thumbs at the first joint; notwithstanding the wound was properly cared for, *tetanus* or "lock-jaw" ensued, and death resulted on the 23d day of August, 1884. Carbon was in good health at the time of the injury, weighed about one hundred and twenty-five pounds, and was seventy-one years old. The appellee was thirty-six years old and weighed about one hundred and sixty pounds.

At the proper time the State, by its attorney, requested on its behalf the following instruction: "If you are convinced beyond a reasonable doubt by the evidence that the defendant Henry Johnson unlawfully committed an assault and battery upon the person of James Carbon, in Porter county, Indiana, on the 16th day of August, 1884, without any intention or purpose to kill him, the said James Carbon, but thereby inflicted a wound on his person by reason of which the said Carbon died in said county, on the 24th day of August, 1884, the defendant is guilty of involuntary manslaughter. Assault and battery, as used in this instruction, may be defined as any unlawful touching, striking, biting, beating or wounding of one person by another, in a rude, insolent and angry manner."

The court refused the instruction, to which the State excepted, and thereupon the court, of its own motion, gave the following: "The defendant Henry Johnson is charged with the crime of involuntary manslaughter, which consists in the unlawful killing of a human being, without any intent to kill, in the commission of an unlawful act, but the act must be such that the known or probable effect of the same would naturally be either to produce serious bodily harm or endanger the life of the person attacked."

To this instruction exception was properly reserved, and the bill of exceptions informs us that this was all the instruction given which defined, or purported to define, the charge of involuntary manslaughter.

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The appellee was found guilty of assault and battery, the jury assessing his punishment at a fine of \$250 and imprisonment in the county jail for a period of ninety days. The question for decision is reserved and presented under section 1846, R. S. 1881.

Counsel for the State present as their view of the law, that if the appellee, while engaged in an unlawful assault and battery upon the person of Carbon, and without any intent to kill, or do him any serious hurt, inflicted a wound upon him which resulted in death, he is guilty of involuntary manslaughter, regardless of the character of the particular act which produced it. As against this view the court instructed that "the act must be such that the known or probable effect of it would naturally be to produce serious bodily harm or endanger the life of the person attacked."

Section 1908, R. S. 1881, defining involuntary manslaughter, provides: "Whoever unlawfully kills any human being without malice, express or implied, * * * involuntarily, but in the commission of some unlawful act, is guilty of manslaughter," etc.

Upon the subject of manslaughter it was said by a learned author: "When an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act which occasioned it. If it be in prosecution of a felonious intent, or, in its consequences, naturally tended to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will only amount to manslaughter." 4 Blacks. Comm., p. 192.

In Foster's Crown Cases, p. 259, quoting from Lord Hale, it is said: "He that voluntarily and knowingly intends hurts to the person of a man, though he intend not death, yet if death ensues, it excuseth not from the guilt of murder, or manslaughter at least; as if A. intends to beat B. but not to kill him, yet if death ensues, this is murder or manslaughter, as the circumstances of the case happen." The author, continuing, says: "If A. intendeth to beat B., in anger or from

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preconceived malice, and death ensueth, it will doubtless be no excuse, that he did not intend all the mischief that followed ; for what he did was *malum in se*, and he must be answerable for the consequence of it. He certainly beat him with an intention of doing him some bodily harm, he had no other intent, he could have no other ; he is therefore answerable for all the harm he did."

The unlawful act which resulted in the homicide for which the appellee was tried, was one which was *malum in se*, and, within the statutory definition, as well as the adjudged cases, where, in the commission of such an act, the death of a human being results, it is manslaughter at the least.

If an act is unlawful, and is of such a character as that the known or probable consequences of it would naturally be to produce serious bodily harm or endanger the life of the person against whom it was directed, the law would infer malice, and the crime would or might be murder. Where death unintentionally ensues from acts or means which, under the circumstances, could not have been supposed to endanger human life, or inflict great bodily injury, the law will not imply malice, and the degree of crime will be reduced from murder to manslaughter. *Commonwealth v. Fox*, 7 Gray, 585.

In the case of *Commonwealth v. McAfee*, 108 Mass. 458, where the accused struck his wife a blow upon her cheek with his open hand, and while falling to the floor she received injuries from striking against a chair, the court said : " Beating or striking a wife violently with the open hand is not one of the rights conferred on a husband by the marriage, even if the wife be drunk or insolent. The blows being illegal, the defendant was at least guilty of manslaughter."

As the unlawful act here involved was *malum in se*, we determine nothing respecting homicides resulting from the commission of unlawful acts which are *mala prohibita*. See 1 Bishop Crim. Law (7th ed.), sections 331, 332.

The instruction asked by the State contained a substantially correct statement of the law as applicable to the evi-

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dence. *Adams v. State*, 65 Ind. 565; *Bruner v. State*, 58 Ind. 159; *Willey v. State*, 46 Ind. 363; 1 Whart. Crim. Law (8th ed.), sections 315, 324, 325.

That given by the court was erroneous, in that it required ingredients not embraced in the statute, and substantially embraced elements which constitute murder.

Appeal sustained, at appellee's costs.

Filed May 26, 1885.

No. 11,405.

FIELD ET AL. v. MALONE ET AL.

PRACTICE.—*Notice by Publication.*—*Affidavit.*—*Case Criticised and Distinguished.*

—The statute does not contemplate a full statement of the cause of action in an affidavit for publication, and an affidavit which states that there is a cause of action in the plaintiffs against the defendants, that it is connected with a contract, and that the defendants are non-residents, is not so defective as to render the notice by publication void. *Fontaine v. Houston*, 58 Ind. 316, criticised and distinguished.

PLEADING.—*Matters in Abatement and in Bar.*—At common law and under the present code matters in abatement must be pleaded prior to pleading matters in bar.

ATTACHMENT.—*Garnishee.*—*Affidavit in Garnishment.*—*Verification.*—Where the garnishee receives notice, and there is a conflict of evidence as to whether the affidavit in garnishment was verified, the Supreme Court will not disturb the finding of the trial court upon that question.

SAME.—*Rights under General Denial.*—*Burden of Proof.*—A general denial filed by a garnishee in attachment proceedings imposes upon the plaintiff the burden of showing that all of the persons to whom the garnishee is indebted are before the court.

SAME.—*Effect of Judgment.*—A judgment against the garnishee will protect him against the claims of his creditors in case the court has jurisdiction of the persons of the creditors and jurisdiction of the subject-matter of the action.

SAME.—*Parties.*—*Partnership.*—A debtor of the firm of Marshall Field & Co. can not be garnished upon a claim due from him to the firm of Field, Leiter & Co., but if all the members of the firm to whom the garnishee is indebted are before the court, the mistake in giving the name of the firm will not prevent the plaintiff from obtaining judgment against the garnishee.

From the Porter Circuit Court.

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137	300
129	147
102	251
135	215
136	616
102	251
143	237
102	251
145	493
102	251
148	89

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A. D. Bartholomew, E. D. Crumpacker and N. W. Bliss,
for appellants.

W. Johnston and W. Pagin, for appellees.

ELLIOTT, J.—James R. Malone, one of the appellees, filed a complaint against a great number of defendants, among whom are Levi Z. Leiter and the appellants Marshall Field, Lorenzo G. Woodhouse, Henry Field, Henry J. Willing and Joseph N. Field, who are described as composing the firm of Field, Leiter & Co. It is alleged that Malone was sheriff of Porter county from November, 1879, to November, 1880; that, on the 23d day of January of the year 1880, John V. Farwell, Charles B. Farwell, William D. Farwell, Simeon Farwell and John K. Harmon, composing a copartnership in the firm name of J. V. Farwell & Co., commenced an action in the Porter Circuit Court upon a note against Joan M., John H. and Edwin M. Trevor, and supplemented such action with proceedings in attachment against the defendants therein; and at their suit a summons and writ of attachment were issued against the Trevors, and delivered to Malone, as sheriff, which summons was duly served by reading, and the writ of attachment by seizing and taking into custody a general stock of goods in store, household goods and live-stock; that this action was pending from the 23d day of January to the 10th day of June, 1880, when it was finally determined; that prior to the final judgment therein, all of the defendants being creditors of the Trevors, filed necessary papers and became parties to the suit and proceeding in attachment of J. V. Farwell & Co.; that upon the final trial of such action, judgments were rendered in favor of the creditors for the amount of their respective claims against the Trevors, but the finding and judgment of the court were against the attaching creditors upon the issues involved in attachment proceedings, and the attached property was ordered released from the levy; that afterward fifteen separate executions were issued upon the order of the creditors on

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such judgments against the goods and chattels of the Trevors, by virtue of which Malone levied upon and took into custody the property theretofore held under the writ of attachment, and held the same until the expiration of his term of office, on the 3d day of November, 1880, when he turned the executions and property, held by virtue of the same, over to his successor; that afterward suits were brought to enforce mortgages against the property so levied upon, and the mortgage claims were adjudged prior liens to the executions, and the property was recovered by the mortgage creditors; that during the time Malone had custody of said property under the attachment and executions, he was required to, and did pay out and expend \$250 for storage, \$248.55 for the care of and for boxing and removing said property; that his fees for serving summons in that case are \$16.40, for serving subpoenas \$6.70, for serving notices \$6.50, and for care of horse \$12, all of which were due and unpaid. It is further alleged that since Malone's claim accrued, Levi Z. Leiter ceased to be a member of the firm of Field, Leiter & Co., and said copartnership is now known as the firm of Marshall Field & Co., but is composed of the same members as the old firm, except Leiter, and the new firm has assumed and agreed to pay the liabilities of the old firm. At the time the complaint was filed Malone also filed an affidavit and undertaking in attachment. On the 24th day of February, 1882, an affidavit was filed charging that the appellant Bartholomew was indebted to Marshall Field, Levi Z. Leiter, Lorenzo G. Woodhouse, Henry J. Willing, Henry Field and Joseph N. Field, and upon this affidavit a writ was issued against the garnishee and duly served on him. On the 4th day of February, 1882, the following affidavit, upon which publication was asked, was filed, to wit: "James R. Malone says, on oath, that he is plaintiff in the above entitled cause, and that he has a good and meritorious cause of action against said defendants; that they are all indebted to him on account and for services performed by him as sheriff of Porter county,

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Indiana, for them in their suit against Joan M., John H. and Edwin Trevor, in the Porter Circuit Court; that the said defendants are all non-residents of the State of Indiana, and are necessary parties to this action." Bartholomew, who was summoned as garnishee, appeared specially and moved to quash the notice to the non-resident defendants, on the ground of the insufficiency of the affidavit, and he also moved to quash the summons and dismiss the proceedings in garnishment. After these motions were overruled, Bartholomew appeared and answered. The first paragraph of his answer is the general denial; the second alleged that at the time he was served with summons he was indebted to the firm of Marshall Field & Co.; that the firm was composed of Marshall Field, Lorenzo G. Woodhouse, John G. McWilliams, Joseph Field and Harlow N. Higginbotham, and no other persons, and that he owed no other indebtedness to the defendants or either of them; that the claims sued upon by the plaintiff are against the firm of Field, Leiter & Co., composed of Marshall Field, Levi Z. Leiter, Lorenzo G. Woodhouse, Henry J. Willing and Joseph N. Field, and that Levi Z. Leiter is not a member of the firm of Marshall Field & Co., to which the defendant is indebted, and McWilliams and Higginbotham are members of the latter firm and were not members of the firm of Field, Leiter & Co. The trial resulted in favor of the plaintiff, and appellants unsuccessfully moved for a new trial.

The affidavit upon which the notice of publication was ordered was not so defective as to render the notice ineffective. It states that there is a cause of action in the plaintiff against the defendants, shows that it is connected with a contract, and alleges that the defendants are non-residents of the State of Indiana. These are the essential facts which authorize notice by publication, and as they are embodied in the affidavit they gave the court jurisdiction to order the publication of the notice. The statute does not contemplate a full statement of the facts constituting the cause of action in the

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affidavit for publication, nor is there any reason for requiring such a statement. The affidavit is not intended to inform the defendant of the particular character of the cause of action urged against him, but its purpose is to exhibit to the court such facts as show that the case is one in which it is proper to give notice by publication. No useful purpose would be subserved by setting forth the facts at length; on the contrary, such a procedure would cumber the record and do no good at all. In *Trew v. Gaskill*, 10 Ind. 265, it was held that it was not necessary for the affidavit to recite a cause of action, and this we regard as sound doctrine. It is true that in *Fontaine v. Houston*, 58 Ind. 316, it is said that "*Trew v. Gaskill*, 10 Ind. 265, is overruled as to this point;" but it is difficult, if not impossible, to ascertain the point of conflict between the two cases. In *Fontaine v. Houston*, *supra*, the affidavit contained no statement of any jurisdictional fact at all, except that the defendants were non-residents; there was, indeed, no attempt to state any others, and the only question before the court was whether such an affidavit was sufficient. There was no such question in *Trew v. Gaskill*, *supra*, and it is not easy to perceive any reason for the declaration that it is overruled even upon one point; but, however this may be, it is clear that the decision in *Trew v. Gaskill*, *supra*, has not been overruled in so far as it decides the principle applicable to this case. The just and practical rule is that laid down in *Dronillard v. Whistler*, 29 Ind. 552, where it was said: "There was an affidavit filed with the complaint, showing the nature of the demand; that the claim was just; the sum the plaintiff believed he ought to recover, and that the defendant was a non-resident of the State. This is all the code requires to authorize notice by publication." There is no just reason for requiring that the affidavit shall do more than state in general terms all the facts essential to give jurisdiction to order publication, for no issue is joined upon it, no information to the defendant is imparted by it, nor does he act upon the affidavit. It is necessary, as held in *Fontaine v. Houston*, *supra*,

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to state all the facts essential to the authority to give notice by publication, but it is not necessary to state these facts with any great degree of particularity. To adopt any other rule would result in confusion, create useless complications, and subserve no good purpose. If it be held that the cause of action must be set forth, then it would follow that if defectively set forth the proceeding would fail, and this would be a result attended with evil. If it be held that the cause of action must be pleaded, then some plan for testing the sufficiency of the affidavit must be devised by the courts, for none is provided by the statute, and this certainly is a result not contemplated by the Legislature. Looking to analogous cases we shall find that it has been steadily held that it is not necessary for the affidavit to state facts particularly, but that general statements, substantially in the language of the statute, are all that is required; this is so in attachment and in replevin, and there is no good reason why it should not be so in such cases as this. We hold that the affidavit before us was sufficient to support the order for publication. *Quarl v. Abbott, ante*, p. 233.

Evidence was offered in support of the allegation that the affidavit in garnishment was not verified, and this was met by opposing evidence that it was duly subscribed and sworn to. There was, therefore, an issue of fact and evidence fully supporting the finding of the court upon that issue, and the general rule is that in such cases the finding of the trial court will not be disturbed. *Lexington, etc., R. R. Co. v. Ford Plate Glass Co.*, 84 Ind. 516, see page 517. This general rule should apply to a case like this where the affidavit has accomplished its purpose and has given the garnishee notice and secured him a trial.

The appellee insists that the plea in abatement, having been filed with the general denial, and forming the second paragraph of the same answer, can not be considered. The foundation of this position is that matters in abatement can not be pleaded with matters in bar, and this unquestionably was the

rule under the common law, and is the rule under the present code. The statute is imperative in its terms, reading thus: "An answer in abatement must precede, and can not be pleaded with an answer in bar." R. S. 1881, section 365. We need not decide whether the remedy adopted to get rid of the plea was appropriate or not, for a right result was reached, and it has long been the rule of this court that a judgment will not be reversed if a correct result was reached although the remedy pursued was not the appropriate one. This rule is, indeed, little more than the corollary of the often repeated rule that a judgment will not be reversed for a harmless error. This we say for the reason that, if Bartholomew had no right to file such a plea, no harm was done him in not permitting him to make it available.

The creditors of Bartholomew were all before the court, except Higginbotham and McWilliams; had they been in court we should not have the slightest hesitation in approving the decision of the trial court, for the fact that Leiter was not a member of the firm to which Bartholomew was indebted did not deprive the plaintiff of his rights. If in making him a party the plaintiff did do an unnecessary thing, it did Bartholomew no injury.

It is true that McWilliams became a member of the firm of Marshall Field & Co. after Bartholomew became its debtor, but this does not change the case, for the question is, was he one of his creditors at the time the process in garnishment was served?

The first question we encounter on this branch of the case is, did the general denial entitle Bartholomew to take advantage of the fact that two of his creditors were not before the court? We think that it did put the appellee to proof that Bartholomew was the debtor of the parties against whom the attachment proceedings were directed. The only ground upon which the appellee had a right to proceed against Bartholomew was that he was the debtor of those against whom the

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attachment issued, and this fact the general denial required the plaintiff to prove. The case is not like that of defendants to the main action, for here the right to proceed against the garnishee depends entirely upon the fact that he is the debtor of the attachment defendant. The garnishee has a right to be protected and this confers the subordinate right to have the plaintiff make proof that the proceeding is against the party to whom he is indebted. It is the right of the garnishee to compel the plaintiff to prove all material facts essential to make the payment of the judgment in the garnishment a protection in case his creditors should sue him. *Waples Attachment and Garnishment*, 374; *Drake Attachment*, section 659.

The question which next confronts us is whether Bartholomew was indebted to the parties named in the complaint and affidavit of garnishment. That he was indebted to Marshall Field & Co. is conceded, but it is insisted that he was not indebted to the firm of Field, Leiter & Co., and that he can not be made liable upon a claim against the latter firm. The contention is that the firm of Marshall Field & Co. is a legal entity entirely distinct from the firm of Field, Leiter & Co., and that a debtor of the one firm can not be garnished upon a claim against the other. We should not be inclined to yield to this argument if the members of the two firms were the same, for if all the parties interested were before the court the garnishee would be fully protected, and that is all he need ask. It is not for him to make questions upon the regularity of the proceedings; it is enough for him if the court has jurisdiction of the subject-matter, and all of his creditors are before it. All that he requires is such a judgment as will protect him in case he is sued by his creditors, and if the court has jurisdiction of the subject-matter and of the persons of the defendants, its judgment will afford him protection. But the case before us is one in which the plaintiff proved the debt due him to be owing by the firm of Field, Leiter & Co., while the debt due from the garnishee was to Marshall Field &

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Co., and all of the members of that firm were not before the court, so that the rights of the garnishee could be fully protected. We do not think the judgment ought to stand. What the judgment should be if all the parties were before the court, is not the question; the question is, what are the rights of the garnishee when his creditors are not all in court?

We have not passed unnoticed the proposition of appellee that Higginbotham was a dormant partner, and, therefore, not a necessary party, but we find no evidence of this fact. The plaintiff and the witness Deckover testify that they did not know that Higginbotham was a partner, but this does not prove that he was a silent member of the firm. The only inference that can fairly be deduced from the evidence is that McWilliams and Higginbotham were both members of the firm to which Bartholomew was indebted.

We have given the argument of appellee upon the proposition that partners are jointly and severally liable full consideration, but we can not think that it meets the questions which the record actually presents. The debtor of the appellee was the firm of Field, Leiter & Co., while the creditor of the garnishee was the firm of Marshall Field & Co., and in order that the garnishee might be fully protected it was necessary to have all members of the latter firm before the court. It was not enough to have in court all the members of the firm of Field, Leiter & Co., but it was also necessary to have in court all the persons who were members of the firm of Marshall Field & Co. at the time the summons was served on the garnishee.

We must reverse the case for the error pointed out, and it is not necessary to notice the other questions argued, as the reversal opens the whole cause as to all the appellants.

Judgment reversed.

Filed June 10, 1885.

 Ex Parte Richards.

No. 12,393.

EX PARTE RICHARDS.

HABEAS CORPUS.—*Practice.*—*Judgment.*—In a *habeas corpus* proceeding a formal judgment is not required to be entered.

SAME.—*Appeal.*—Where, in a *habeas corpus* proceeding, the record shows a decision of the court below refusing to admit the petitioner to bail, the petitioner may appeal from such decision to this court, notwithstanding the fact that no formal judgment has been rendered in the proceeding.

SAME.—*Burden of Proof.*—In a *habeas corpus* proceeding the burden of proving the allegations in the petition is on the petitioner.

From the Perry Circuit Court.

C. H. Mason and *W. Henning*, for appellant.

F. T. Hord, Attorney General, and *W. B. Hord*, for the State.

Howk, J.—On the 18th day of May, 1885, the appellant Charles Richards was arrested upon a warrant issued by the coroner of Perry county, charging him with the murder of one Reuben Johnson, at such county, on the 17th day of May, 1885. He was taken before a justice of the peace of the county, and, upon an examination then had, he was committed to the county jail upon such charge without bail. On the same day he presented his verified petition to the Honorable George L. Reinhard, judge of the Perry Circuit Court, in vacation, alleging therein that his killing of Reuben Johnson was in his own just and proper self-defence; that the proof of his guilt of murder was not evident nor the presumption strong, and that he was entitled by law to be let to bail, and praying for the issue of a writ of *habeas corpus*, and a hearing thereon. The writ was issued accordingly, and, upon the hearing had thereon, the honorable judge aforesaid refused to let the prisoner Richards to bail.

From this decision Richards has appealed to this court and has here assigned, as error, the refusal of the judge of the Perry Circuit Court to let him to bail.

On behalf of the State, the attorney general has interposed

102	260
134	111
102	260
137	93
103	260
147	29

Ex Parte Richards.

a motion to dismiss this appeal, upon the ground "that the record does not show any judgment whatever of the court below to appeal from." In section 1120, R. S. 1881, it is provided that in all such cases as the one now before us, "the court or judge shall summon the prosecuting witnesses, investigate the criminal charge, discharge, let to bail, or recommit the prisoner, as may be just and legal." The statute nowhere requires the entry of any formal judgment in a *habeas corpus* proceeding. It is shown by the bill of exceptions, in the record of this cause, that Judge Reinhard summoned the prosecuting witnesses, investigated the charge of murder against the appellant Richards, and upon all the evidence given in the cause refused to let him to bail. This decision of the judge was a final disposition of the appellant's application to be let to bail, and complied substantially with the requirements of the statute. From this decision Richards had the right to appeal to this court, under section 646, R. S. 1881, and he can not be deprived of this right by any informality in the proceedings or judgment. The motion on behalf of the State to dismiss this appeal is overruled.

In section 17 of the Bill of Rights, in our State Constitution, it is provided that murder or treason shall not be bailable, when the proof is evident or the presumption strong. In this case, as we have seen, Richards admits in his petition that he killed Reuben Johnson, but he alleges that, in so doing, he acted in self-defence, and that the proof of his guilt of murder, in killing Johnson, was not evident nor the presumption strong. The burden of proving the truth of these allegations in his petition, under the decisions of this court, was on the appellant Richards. *Ex Parte Heffren*, 27 Ind. 87; *Ex Parte Jones*, 55 Ind. 176.

The evidence adduced, upon the hearing of appellant's petition, is in the record by a proper bill of exceptions. No good purpose could be subserved by our setting out, in this opinion, even the substance of the evidence, and it would

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seem to be improper for us to comment thereon, as the case is yet to be tried. *Ex Parte Sutherlin*, 56 Ind. 595. The cause has been ably argued by appellant's learned counsel and by the attorney general on behalf of the State. We have duly considered and weighed the evidence appearing in the record, as seems to be required by the decisions of this court. *Ex Parte Walton*, 79 Ind. 600, and cases cited. Upon full consideration of the evidence and of the arguments of counsel, we are of opinion that we ought not to disturb the finding and decision of Judge Reinhard in refusing to let the defendant to bail.

The judgment is affirmed, with costs.

Filed June 17, 1885.

No. 11,877.

BAUER v. SAMSON LODGE, KNIGHTS OF PYTHIAS.

PLEADING.—Demurrer.—Plea in Abatement.—A demurrer is not a plea in abatement, and matters in abatement may be pleaded after a ruling on demurrer to the complaint, unless the matter in abatement is as to the jurisdiction of the person of the defendant.

INSURANCE.—Mutual Benefit Societies.—Duty of Members to Take Notice of By-Laws.—A person who becomes a member of a secret mutual benefit society is bound to take notice of its by-laws.

SAME.—Power of Mutual Benefit Societies to Limit Right to Sue.—Mutual benefit societies may prescribe regulations as to procedure in enforcing claims, and may require appeals to superior bodies before instituting suit, but they can not entirely take away the right to invoke the aid of the courts in enforcing claims existing in favor of its members upon contracts.

SAME.—Mutual Benefit Societies are Insurance Companies.—A mutual benefit society which, for an agreed compensation, agrees to pay benefits to its members, is not a purely benevolent society, but is, in respect to the contract to pay benefits, an insurance company.

SAME.—What By-Laws Will Limit Right to Sue.—By-laws simply giving the right of appeal to a superior body, to which the mutual benefit society belongs, will not deprive a member of the right to sue; in order to have this effect the by-laws must positively require members to prosecute an appeal before resorting to the courts for redress.

108	269
126	55
136	153
102	262
131	423
102	262
159	77
102	262
180	198

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SAME.—Claims for Money.—Question of Policy and Doctrine.—A member of a secret order which exercises the privileges and powers of a mutual benefit society, who sues for a benefit due him under a contract, occupies an essentially different position from one who presents a question of policy, doctrine, or discipline, and courts will entertain jurisdiction in the one case, but, as a general rule, not in the other.

CUSTOM.—A custom that a party shall not sue in a court of justice for money due him on a contract is not valid.

From the Clark Circuit Court.

J. H. Stotsenburg and G. H. Voight, for appellant.

M. Z. Stannard, J. G. Howard and J. F. Read, for appellee.

ELLIOTT, J.—The complaint of the appellant alleges that the appellee is a corporation, organized under the laws of Indiana; that it is a subordinate lodge, acting under a charter granted by the Grand Lodge of Knights of Pythias of the State of Indiana; that in accepting the charter the appellee agreed to act in obedience to the enactments of the Grand Lodge; that section four of article five of the by-laws of the Grand Lodge is as follows:

“Section 4. Every Knight who has been in fellowship for six months, incapacitated by sickness or other disability from attending to his usual business or occupation, shall be considered a beneficial member, entitled to receive such weekly benefits as the by-laws prescribe: *Provided*, The minimum sum of one dollar per week must be paid through said period of probation: *And further provided*, That his disability is not brought on by immoral conduct, and that he is in good standing; but any lodge may, by its by-laws, provide that no benefits shall be paid for the first week's sickness or disability.”

That the appellee enacted a by-law prescribing that members who had been in fellowship six months when incapacitated by illness should receive five dollars per week as benefits; that appellant has been a member of the defendant lodge in good standing since the 1st day of March, 1880, and as such entitled to all the rights and benefits of a member; that on the 9th day of March, 1880, he became ill, and was thereby

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incapacitated from attending to his usual business, and that his illness was not brought on by immoral conduct.

The appellant answered in abatement. The allegations of the plea are substantially these: That the defendant is a subordinate lodge of the Grand Lodge of the Knights of Pythias of Indiana; that the appellant, when he became a member, pledged himself, by signing a written petition, that he would conform to the constitution, by-laws and regulations of the defendant; that, among the rules and regulations of the Supreme Lodge of the order, are the following provisions:

Article 1, section 1. "The Supreme Lodge is the source of all true and legitimate authority in the order of Knights of Pythias wheresoever established. It possesses original and exclusive jurisdiction and power, (1) To establish the order in States, Districts, Territories, Provinces, or countries where the same has not been engrafted. (2) To charter Grand Lodges and define the territorial extent of their jurisdiction. (3) To hear and determine all appeals from Grand and Subordinate Lodges when the same are properly brought before it, in accordance with the regulations of the order, and to provide by legislation for the enforcement of its decisions."

Article 7, section 1. "Grand Lodges exist by virtue of a charter of dispensation issued by authority of the Supreme Lodge. They shall conform to the regulations prescribed by the Supreme Lodge in accordance with this constitution, and shall, subject to the provisions hereof and right of appeal, have exclusive original jurisdiction over all Subordinate Lodges within their territorial limits, and over the members attached to the same."

Article 7, section 3. "Each Grand Lodge shall adopt a constitution for its own government and also a constitution for its subordinates, which constitution shall be in accordance with the provisions of this constitution and the laws made in pursuance hereof."

That more than ten years since the Supreme Lodge issued a charter to the Grand Lodge of Indiana, and that Grand

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Lodge afterwards chartered the defendant as a subordinate lodge of its jurisdiction; that in the constitution and laws of the Grand Lodge of Indiana are the following provisions:

"Section 2. This Grand Lodge shall have jurisdiction over all lodges of Knights of Pythias within the State of Indiana.

"Section 3. It possesses the right and power (1) of granting charters, (2) of suspending or taking away the same for proper cause, (3) of receiving and hearing all appeals and of redressing grievances arising in lodges under its jurisdiction, (4) of enacting by-laws for its government and support: *Provided*, The same are not in violation of the laws of the Supreme Lodge."

Article 5, section 8. "After the installation of officers, the Grand Chancellor shall appoint the following committees to serve one year:

"(1) A committee of appeals and grievances.

"(2) A committee of law and supervision.

"(3) A committee of subordinate lodge constitution and by-laws.

"(4) A committee on state of the order.

"(5) A committee on finance and accounts.

"(6) A committee on subordinate lodge returns.

"(7) A committee on credentials.

"(8) A committee on mileage and per diem.

"Each committee shall consist of three members, except the committee on appeal and grievances, which shall consist of five members."

Article 9, section 4. "The committee on appeals and grievances shall hear all appeals and grievances from lodges or members of lodges referred to them by Grand Lodge or Grand Chancellor, and report their decisions with the utmost dispatch to the Grand Lodge or Grand Chancellor during its recess, but no member of this committee shall serve on any case of appeal from the lodge of which he is a member."

That these provisions of the constitution and by-laws of the order have been in force since the organization of the de-

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fendant, and are still in force; that these provisions require a member aggrieved by the decision of a subordinate lodge to appeal first to the Grand Lodge of the State, and then, if dissatisfied, to the Supreme Lodge; that according to the usages and customs of the order that have "existed in said order since the time whereof the memory of man knoweth not to the contrary, grievances in the denial of benefits have always been redressed by subordinate lodges or on appeal;" that the plaintiff has not appealed from the decision of the lodge denying him benefits.

Prior to filing this plea the appellee demurred to the complaint, alleging for cause that it did not state facts sufficient to constitute a cause of action, and it is contended by the appellant that this precludes the appellee from pleading in abatement, and upon this contention arises the first question.

It is important to keep in mind the fact that the plea does not present the question of the jurisdiction of the person of the defendant, but presents the question of the right to maintain the action. The question, therefore, is very different from that which would arise if the defendant had demurred and then attempted to question the jurisdiction of the court over its person. As a general rule appearance waives the question of jurisdiction of the person, but here the defendant submits to the jurisdiction and contests the right of the plaintiff to maintain the action. It concedes jurisdiction of the person, but affirms that the action must abate, because the plaintiff has not taken such steps as enabled him to prosecute it.

Appellant's counsel assume that a demurrer is a plea in bar, and, proceeding upon this assumption, affirm that the case is within the rule that after pleading in bar the defendant can not plead in abatement. The validity of this argument depends entirely upon the correctness of the assumption on which it rests. This assumption can not be made good. Our statute expressly recognizes the difference between demurrers and answers, and the common law quite as fully recognized the difference between pleas and demurrers. In their nature they

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are essentially different; a demurrer presents an issue of law, while an answer presents an issue of fact. Gould says: "But a demurrer to the declaration is not classed among pleas to the action—not only because it may be taken, as well to any other part of the pleadings, as to the declaration; but also because it neither affirms nor denies any matter of fact, and is, therefore, not regarded as strictly a plea of any class; but rather as an excuse for not pleading." Gould Pleading, chap. 2, section 43.

Error can not be successfully assigned upon a ruling denying a motion to strike out part of a complaint.

One who becomes a member of an organization such as the Knights of Pythias is chargeable with knowledge of its laws and rules, and is bound by them. He can not be ignorant of them, nor can he refuse obedience to them, unless, indeed, they are illegal or require the performance of acts which the law forbids. *Simeral v. Dubuque M. F. Ins. Co.*, 18 Iowa, 319; *Coles v. Iowa State M. Ins. Co.*, 18 Iowa, 425; *Mitchell v. Lycoming M. Ins. Co.*, 51 Pa. St. 402; *Fugure v. Mutual Society of St. Joseph*, 46 Vt. 362. By-laws, not in themselves illegal and not requiring the performance of acts contrary to law, must, therefore, be deemed binding upon all persons who become members of such an organization as the Knights of Pythias, and the question is as to the existence and effect of the by-laws in this particular case.

There is some conflict of opinion as to the extent to which such an organization may go in restricting actions for benefits promised its members, some of the cases holding that it may prohibit actions at law altogether and make its own decisions conclusive; others holding that it may not materially restrict the right to sue. *Black, etc., Society v. Vandyke*, 2 Whart. 309; *Osceola Tribe, etc., v. Schmidt*, 57 Md. 98; *Harrington v. Workingmen's Benev. Ass'n*, 27 Alb. L. J. 438; *Poultney v. Bachman*, 31 Hun, 49; *Lafond v. Deems*, 81 N. Y. 507; *Toram v. Howard Beneficial Ass'n*, 4 Pa. St. 519; *Anacosta Tribe, etc., v. Murbach*, 13 Md. 91; *Dolan v. Court of Good Samaritan, etc.*, 128 Mass. 437.

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The reasonable rule is, that such an organization may provide methods for redressing grievances and deciding controversies, and may compel members to resort to the prescribed method of procedure before invoking the power of the courts, but that it may not entirely prohibit members from suing to recover benefits accruing to them under the by-laws of the organization. Men voluntarily enter such organizations, and in becoming members subscribe to their laws, and if these laws make provision for trying controversies, the member aggrieved must pursue the course prescribed before resorting to the courts to enforce his claims. There is no valid reason why he should not be compelled to do what he has agreed, and the harmony and efficiency of such organizations require that all measures provided and required by their by-laws should be exhausted before appealing to the courts to settle the controversy. On the other hand, it would be unjust to permit such organizations to take from their members all right of action for money due them. Claims for money due by virtue of an agreement are unlike mere matters of discipline, questions of doctrine, or of policy, and are not governed by the same rules. A corporation which promises to pay a certain sum as benefits during a member's illness, in consideration of his payment of dues, is not a purely benevolent organization; it may be, and doubtless is, benevolent and charitable in a great degree, but it is not a benevolent organization in the sense of dispensing benefits without consideration. The consideration the order receives is the dues paid by the member, and in return it promises him benefits. In speaking of an order of a character similar to the Knights of Pythias, the Supreme Court of Massachusetts said: "The corporation is not a mere charitable society, but is rather in the nature of an association for the mutual insurance of its members against sickness or accident. If it refuses to perform its contract contained in the by-laws, the member who is injured may have recourse to the proper courts to enforce the contract." *Dolan v. Court of Good Samaritan, etc., supra.*

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Our own decisions have recognized a like doctrine as applicable to the life insurance features of such organizations. *Elkhart Mutual Aid, etc., Ass'n v. Houghton*, 98 Ind. 149; *Supreme Lodge, Knights of Pythias, v. Schmidt*, 98 Ind. 374.

It is not within the power of individuals or corporations to create judicial tribunals for the final and conclusive settlement of controversies. In a case in principle the same as the present, it was said: "To create a judicial tribunal is one of the functions of the sovereign power; and although parties may always make such tribunal for themselves, in any specific case, by a submission to arbitration, yet the power is guarded by the most cautious rules. * * * It would hardly accord with this scrupulous care to secure fairness, in such cases, that parties should be held legally bound by the sort of engagement that exists here, by which the most extensive judicial powers are conferred upon bodies of men whose individual members are subject to continual fluctuation." *Austin v. Searing*, 16 N. Y. 112.

It is to be noted that agreements to submit a matter to arbitration are valid when made after the specific controversy has actually arisen, and not when made in advance, certainly not when the agreement provides that one of the interested parties shall be the sole arbitrator. The weight of authority is very decidedly against the power of parties to bind themselves in advance that a controversy that may possibly arise shall be conclusively settled by an individual or a corporation, and to that doctrine this court is committed. *Kistler v. Indianapolis, etc., R. R. Co.*, 88 Ind. 460; *Insurance Co. v. Morse*, 20 Wall. 445; *Mentz v. Armenia F. Ins. Co.*, 79 Pa. St. 478 (21 Am. R. 80); *Wood v. Humphrey*, 114 Mass. 185.

As all persons having a money demand against an individual or a corporation have a right to resort to the courts in the first instance, when payment is withheld, to coerce payment, that right must exist unless it clearly appears that it has been abridged or surrendered. In the case before us the answer concedes the right to the benefits claimed, but affirms

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that an action can not be maintained because the claimant has not taken the steps which must precede the assertion of the claim in a court of justice. In order that this general right, a right possessed by all citizens, should be curtailed, it must clearly appear that he to whom the money is due, has agreed that it may be abridged. One who asserts a claim to money due upon a contract, occupies an essentially different position from one who presents a question of discipline, of policy, or of doctrine of the order or fraternity to which he belongs. All the decisions, from first to last, recognize a broad distinction between the two classes of cases, and the one before us belongs to the class where property rights are involved, and is a member of a class cognizable by the courts.

The policy of the law, as declared in our Constitution and by our decisions, is to freely open the courts to those who seek money due them upon contract, and the party who asserts that the right to invoke the aid of the courts has been curtailed, must show a clear agreement abridging the right. These principles necessarily lead to the conclusion that a corporation which has agreed to pay pecuniary benefits to one of its members can not successfully resist an appeal to the courts without showing an express or implied agreement that before making such an appeal the members shall pursue a course of procedure prescribed by the laws of the organization.

In the case in judgment there is a clear right to the benefits claimed, for so the by-laws provide, and where there is a right there is a remedy. If there is a remedy it is the usual one, unless by a legal contract the parties have otherwise agreed; here the usual remedy, open and free to all citizens having a just demand, is an ordinary action at law, and the question narrows to this, has the claimant abridged his remedy by contract? We find nothing in the by-laws which can be deemed a partial or a total surrender of his right to enforce his contract in the usual method. It is true that there is a general right of appeal provided for, but there is no stipulation that the claimant of benefits shall appeal; and, if we

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are correct in our reasoning, there is no abridgment of his right to pursue the usual remedies. In order to abridge this right there must be a stipulation to that effect. Men do not lose their legal right to enforce their contracts unless they have yielded it up by agreement. The provision that an aggrieved party may appeal is permissive; it does not wrest from him the right conferred upon him by law. If a man has a legal right, and the corporation of which he becomes a member adds another, that of appeal to its superior governing bodies, the added right is merely cumulative, it is not exclusive; positive words only can take away an existing right. Conferring a right to pursue a given course does not destroy an existing right; in order to destroy such a right proper limiting words must be employed. Here there are no limiting words; there is nothing that limits the general right to sue in the courts, and a right such as this can not be taken away without a clear agreement surrendering it. If it had been the intention to require members to surrender their right to sue at once upon the breach of the contract, and to compel them to first appeal to the grand bodies of the order, it would have been easy to so declare; but there is no such declaration, and, therefore, no agreement taking away the right to sue for the enforcement of the contract which the claimant possessed by virtue of the law of the land.

The right to sue is one given, as we have seen, by law, and no custom can be good which is contrary to law. A custom that a party having a claim for money due upon contract may not pursue the usual remedies provided by law, is not valid. *Manson v. Grand Lodge, etc.*, 30 Minn. 509; *Thompson v. Insurance Co.*, 104 U. S. 252; *Franklin Ins. Co. v. Humphrey*, 65 Ind. 549 (32 Am. R. 78); *Spears v. Ward*, 48 Ind. 541; *Wallace v. Morgan*, 23 Ind. 399.

The court below erred in overruling the demurrer to the plea, and the judgment must be reversed.

Filed June 13, 1885.

 Marsh v. Thompson.

No. 11,788.

MARSH v. THOMPSON.

VENDOR AND PURCHASER.—*Want of Title in Grantor.*—*When Purchase-Money can not be Withheld.*—Where a deed is made and accepted, and possession taken under it, want of title in the grantor will not enable the purchaser to resist the payment of the purchase-money, or recover more than nominal damages on his covenants, while he retains the deed and possession, and has been subjected to no inconvenience or expense on account of the defect of title.

SAME.—*Acceptance of Estate.*—*Estoppel.*—By the acceptance of an estate the party accepting is estopped from denying the title under which he holds.

PRACTICE.—*Failure to Assess Nominal Damages.*—A judgment will not be reversed because of a failure to assess or allow merely nominal damages.

From the Marshall Circuit Court.

M. A. O. Packard and *A. C. Capron*, for appellant.

C. Kellison, for appellee.

NIBLACK, J.—On the 11th day of April, 1883, Lemuel M. Thompson sold, and by warranty deed conveyed, to Martin V. Marsh two tracts of land in Marshall county, constituting together a farm, with buildings and improvements thereon, and containing an aggregate area of near ninety acres. The conveyance was made in consideration of the sum of \$4,000. Marsh paid \$2,000 in cash and assumed to pay a mortgage already upon the farm for about \$1,500. For the remaining \$500 he gave his promissory note, payable six months after date, and executed a mortgage on both tracts to secure its payment.

This suit was brought by Thompson against Marsh to obtain judgment upon the note given as above and to foreclose the mortgage executed as stated to secure its payment. One James Thompson was also made a defendant to answer as to some supposed interest held by him in the mortgaged property, but he made default, and no further notice was taken of him during the progress of the cause.

Marsh answered: First. That the note was given without any consideration whatever. Second. That the plaintiff had

102	273
134	246
136	615
102	273
146	403

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no title to seventeen acres of the lands, for which the note was given in part payment, and that in consequence he, Marsh, had already paid more than the lands for which he had received a good title were worth. Third. By way of cross complaint, charging that the lands purchased from the plaintiff formerly belonged to one Adam Appelman, who, being still the owner thereof, died in 1877, intestate, leaving Hannah E. Appelman as his widow and three minor children, also the children of the said Hannah, all of whom still survive him; that not long after the death of the said Adam Appelman, the widow commenced partition proceedings against the said minor children, which resulted in having seventeen acres of the lands in question, estimated to be worth \$1,800, set off to her in severalty; that the dwelling-house, barn, out-houses and orchard, embracing the most valuable part of the improvements belonging to the farm, were situate upon the seventeen-acre tract thus set off to the widow; that about the time the partition was made the widow intermarried with one John R. Covert, whose wife she still is; that afterwards, at a guardian's sale, the plaintiff became the purchaser and consequent owner of that part of the farm which had been set off to the minor children, which included all not taken by the widow; that the plaintiff thereupon also contracted with Hannah E. Covert the late widow, for the purchase of the seventeen-acre tract set off to her, and received from her and her present husband a deed of conveyance for the same; that these two purchases, and the conveyances made in pursuance of them, constituted the only claim of title which the plaintiff had to the lands conveyed by him to the defendant Marsh; that at the time of such conveyance the plaintiff represented that his title was perfect and complete, and that the defendant Marsh had reason to believe, and did believe, that it was entirely good until a short time before the commencement of this suit. Wherefore the defendant Marsh answered that the plaintiff never had any

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title to the part of the land set off to the widow of Adam Appelman, and demanded that the plaintiff be enjoined from the further prosecution of this suit until he should first make good this defect in the title which he assumed to convey.

Demurrers were sustained to the second paragraph of the answer and to the cross complaint, and, Marsh declining to plead further, the circuit court, after hearing the evidence, rendered judgment against him for the amount of the note, and decreed a foreclosure of the mortgage, executed as herein above stated, to secure its payment.

Error is assigned upon the decision of the circuit court sustaining the demurrer to the second paragraph of the answer, as well as upon the similar ruling upon the cross complaint, and as the same facts are to some extent involved in both pleadings, the argument is addressed exclusively to the questions presented by the cross complaint.

As contended, this court has repeatedly held that a conveyance made by a former widow, under circumstances similar to those attending the conveyance from Mrs. Covert and her husband to the appellee, conveys no title to the grantee, and some of the cases go to the extent of holding that such former widow may, at any time, re-assert her title and right of possession to the land thus attempted to be conveyed away by her. *Vinnedge v. Shaffer*, 35 Ind. 341; *Nesbitt v. Trindle*, 64 Ind. 183; *Scott v. Greathouse*, 71 Ind. 581; *Smith v. Beard*, 73 Ind. 159; *Avery v. Akins*, 74 Ind. 283; *Connecticut M. L. Ins. Co. v. Athon*, 78 Ind. 10; *Miller v. Noble*, 86 Ind. 527.

The rigor of the rule prescribed by section 18 of the statute of descents, 1 R. S. 1876, p. 411, upon which the earlier cases rest, has been somewhat modified by having two provisions since annexed to it. See section 2484, R. S. 1881. The rights and liabilities of married women have, also, been enlarged in other respects within the past few years. A married woman may now be bound by an estoppel *in pais*, in the same manner, and to the same extent, as if she were not under

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coverture. She is also now bound by her covenants of title in the conveyance of her separate property. See, also, sections 5117 and 5118, R. S. 1881.

Assuming that the deed executed by Mrs. Covert and her husband to the appellee was a warranty deed, it is claimed that the former is now estopped by her covenants of title from re-asserting any claim to the seventeen-acre tract of land in controversy, and that hence the appellant has a good title to that tract of land by estoppel during the life of Mrs. Covert. It is also claimed that as Mrs. Covert put the appellee in possession of the land set off to her under a deed purporting to convey full title, and thus seemingly conferred upon him the power to sell and convey that land to the appellant, she is now, also, estopped by her conduct from re-asserting any claim of her own to the land in question.

In the first place, the cross complaint did not charge that the deed from Mrs. Covert to the appellee was a warranty deed; we ought not, therefore, to assume that it was, or to decide anything upon the theory that it was a deed of that character. In the next place, all the facts necessary to raise the question of the alleged estoppel of Mrs. Covert by her conduct are not averred; nor is a consideration of that question essential to a proper decision of this cause.

It is either charged, or inferentially admitted, that the appellant is in possession of the entire Appelman farm under a warranty deed executed to, and accepted by, him from the appellee, and that this possession has never been disturbed, nor has he been put to any expense, by any claim of adverse title by or on behalf of Mrs. Covert.

As applicable to a similar state of facts, this court, in the case of *Small v. Reeves*, 14 Ind. 163, said: "Where a deed is made and accepted and possession taken under it, want of title will not enable the purchaser to resist the payment of the purchase-money, or recover more than nominal damages on his covenants, while he retains the deed and possession, and has been subjected to no inconvenience or expense on ac-

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count of the defect of title. This is, in many of the cases, because the purchaser's possession, being under color of title, may continue undisturbed for twenty years, and thus become perfect, and he be uninjured. And he may rely on the covenants in his deed for redress, if injury occurs." This case has been approved and followed in many more recent cases, and has become a leading case on the subject embraced in the quotation we make from it. *Van Nest v. Kellum*, 15 Ind. 264; *Hacker v. Blake*, 17 Ind. 97; *Sumner v. Coleman*, 20 Ind. 486; *Hanna v. Shields*, 34 Ind. 84; *Beal v. Beal*, 79 Ind. 280; *Gibson v. Richart*, 83 Ind. 313. But it is insisted that the general principles recognized by the foregoing cases can not be made decisive of this case, because, under all the circumstances attending it, a period of forty years might elapse without extinguishing the adverse claim of the widow and all the children of Adam Appelman to that part of the farm which was set off to the widow.

In answer to that argument it may be said that the relief which may be afforded by lapse of time has only been given prominence in a class of cases, and then only in a rather incidental way. The doctrine announced as above in the case of *Small v. Reeves*, *supra*, really rests upon the broad and equitable principle that a purchaser of real estate ought not to be permitted to hold on to his deed and to the use and enjoyment of the premises, and, at the same time, resist the payment of the purchase-money. *Sebrell v. Hughes*, 72 Ind. 186.

No man is compelled to accept a defective title when he has bargained for or has reason to expect a good title, but if a defective title is accepted, and possession is taken under it, under circumstances which do not entitle the purchaser to a rescission, such purchaser has no claim for anything more than nominal damages until eviction, either actual or constructive, occurs.

It may be said generally that the relation which the purchaser of land not fully paid for bears to the vendor is the same in equity as that between landlord and tenant so far as

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the doctrine of estoppel is involved. Bigelow Estop. (3d ed.), 428, and authorities there cited. By the acceptance of an estate, the party accepting is estopped from denying the title under which he holds. Co. Litt. 352a. A judgment will not be reversed because of a failure to assess or allow merely nominal damages. *Platter v. City of Seymour*, 86 Ind. 323.

Our conclusion, consequently, is that the cross complaint did not make a case for equitable relief of any kind in favor of the appellant; also, that no material injury was, in any event, inflicted upon the appellant by the sustaining of the demurrer to the second paragraph of his answer.

The judgment is affirmed, with costs.

Filed June 16, 1885.

No. 11,414.

SCOTT v. THE STATE, EX REL. DALE.

102	277
156	200

BASTARDY.—*Rulings after Finding.*—*New Trial.*—*Practice.*—In a bastardy case the trial proper ends with the finding that the defendant is the father of the child, and no question will be raised upon a ruling in the proceedings subsequent to such finding by assigning such ruling as a cause for a new trial.

SAME.—*Evidence.*—*Waiver.*—A failure to object to the judgment or to move for its modification is a waiver of any supposed error of the trial court in refusing to hear evidence, offered after the finding, as to the defendant's financial condition.

SAME.—*Financial Condition of Defendant.*—*Excessive Judgment.*—The fact that the defendant in a bastardy proceeding has no property, and no means of obtaining money except by his labor, will not justify the reversal of a judgment of five hundred dollars, payable in instalments, for the support of the child.

From the Wabash Circuit Court.

M. H. Kidd and N. G. Hunter, for appellant.

J. D. Conner and J. D. Conner, Jr., for appellee.

ZOLLARS, J.—The finding and judgment of the court below are, that appellant is the father of a bastard child, and shall

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pay five hundred dollars for its support and maintenance, of which amount fifty dollars shall be paid at once, and the balance in yearly instalments of seventy-five dollars.

After the announcement of the finding that appellant is the father of the child, he offered to prove that he had no property of any kind, and had no means of obtaining any money except by his labor. The court refused to hear this offered evidence, and rendered the above judgment. To this refusal appellant excepted. He assigned this refusal as one of the causes for a new trial, but he neither objected to the judgment nor moved for its modification. It has been held, and correctly held, that in a case like this the trial proper ends with the finding that the defendant is the father of the child, and that hence no question will be raised upon a ruling in the proceedings subsequent to such finding by assigning such ruling as a cause for a new trial. *McIlwain v. State, ex rel.*, 80 Ind. 69.

In such a proceeding the question and practice as to the amount of the judgment are analogous to the proceedings in partition, in which it has been held that the question of the divisibility of the property is not a question so connected with the trial proper as that rulings upon it will be raised by a motion for a new trial. *Buchanan v. Berkshire L. Ins. Co.*, 96 Ind. 510; *Hannah v. Dorrell*, 73 Ind. 465; *Thompson v. Davis*, 29 Ind. 264.

If there were error here as to the amount of the judgment, and that question was properly preserved and presented for review, it would not result in a reversal of the entire judgment, but simply in a remanding of the case, with instructions to hear the evidence and render the proper judgment. But the question is not presented by the record.

As we have said, there was a failure to object to the judgment or move for its modification. This failure must be regarded as a waiver of any supposed error of the trial court in refusing to hear the offered evidence.

Without extending this opinion to give the reasons, we may

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state in passing that the amount of the judgment is not such as would justify a reversal, were it conceded that appellant has no property and no means of obtaining money except by his labor.

The judgment is affirmed, with costs.

Filed June 16, 1885.

No. 12,178.

KIEFER v. TROY SCHOOL TOWNSHIP OF PERRY COUNTY.

TOWNSHIP TRUSTEE.—Schools. — Cash Advanced to Teachers.—A township trustee, who in good faith employs necessary and proper teachers, and when it is unexpectedly found that the public funds provided are insufficient to pay them in full, advances the deficit out of his own money, has a demand against the school township which he may recover.

From the Perry Circuit Court.

H. J. May and *S. Joseph*, for appellant.

W. Henning, for appellee.

MITCHELL, C. J.—From the complaint in this case it appears that Lawrence Kiefer was the trustee of Troy School Township, in Perry county, in the year 1883; that he had made estimates of the funds likely to come into his hands for tuition purposes, and relying on such estimates he employed competent and licensed teachers for the several school districts in his township, and entered into written contracts with them at the usual stipulated wages, and that the number employed was necessary to supply the requirements of the school children of the township; that the several teachers employed carried out their contracts in good faith, and taught the township schools in all respects according to their agreements; that at the end of the term for which they were employed, the tuition fund—less having been received through some miscalculation than was expected—having been exhausted in making proper disbursements therefrom, and there remaining due the

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several teachers the sum of \$708.96, the appellant advanced and paid the same out of his own funds, and that this sum was received by them for their services; that he made report of his doings in that regard to the board of commissioners, who approved the same, and at the direction of the board the county auditor gave him a certificate of the amount found due him from the township, from which action of the board no appeal has been taken; that he has demanded payment for the money thus advanced and allowed from his successor, who refuses to pay; that it was the intention of the several teachers and the trustee at the time he paid them not to extinguish their claims against the township, but to transfer to him their rights against it.

To this complaint a demurrer was sustained, and the sole question is, did it state a cause of action upon which the plaintiff was entitled to recover?

Of a case in some respects involving the same principles, an eminent judge said: "This is an attempt to impale an honest debt on the sharp points of the law, which ought not to succeed." *Heidelberg School Dist. v. Horst*, 62 Pa. St. 301.

Two grounds are urged as obstacles in the way of the appellant's right to receive payment of the money advanced by him for the benefit of the township. It is said: 1. That because he was trustee of the township, the payment of its debts was a voluntary payment, and a stranger can not, by voluntarily paying the debt of another, maintain against the other assumpsit for such payments. 2. That if the payment was not voluntary, the trustee could create no obligation against the township by dealing with himself.

The propositions above stated enunciate sound and salutary principles of law, which are of binding obligation in all cases in which they apply, but they have no application to the case before us.

It is conceded by the demurrer to the complaint, that the teachers were hired in good faith, under the belief that the

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tuition funds provided would be sufficient for their payment; that the township had the benefit of their services, and became liable for their wages, and having no funds to discharge its just obligations, the appellant advanced the money out of his own pocket and paid a debt, the benefit of which the school corporation received.

Under the ruling of this court in *Harmony School Tp. v. Moore*, 80 Ind. 276, the township was liable for the services of its school teachers whether it had the funds to pay or not. It was there held that it was no excuse for the dismissal of a teacher, before the expiration of the term for which he was employed, that the fund out of which he was to be paid was exhausted. This ruling was followed in *Harrison School Tp. v. McGregor*, 96 Ind. 185, where it was again held that the liability of a township to pay its teachers did not depend upon whether it had funds for their payment or not.

Quoting from an approved authority, this court said, in *Bicknell v. Widner School Township*, 73 Ind. 501: "Persons who have in any way advanced money to a corporation, which money has been devoted to the necessities of the corporation, are considered in chancery as creditors of the corporation to the extent to which the loan has been so expended." When a necessity exists for so doing, and the trustee in good faith advances money to liquidate a just debt owing by the township, for which it is unquestionably bound, and in the creation of which it was benefited, no reason is perceived why he should not be reimbursed as well as a stranger from whom he might have borrowed the money. *Bristol M. & M. Co. v. Probasco*, 64 Ind. 406.

It can no more be said in such case that the officer has contracted with himself, than in the case of an agent whose duty it is to attend to the interests of his principal, who, in an emergency, advances money for the principal's benefit. He has not contracted with himself. He has done nothing except, in the interest of the school township whose servant and agent he was, and whose advantage it was his duty to sub-

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serve, to advance his money for the liquidation of its debts on contracts which had been made and executed. An equitable obligation is thus raised against the school corporation to repay him the moneys advanced.

In the case of *Porter v. Dunlap*, 17 Ohio St. 591, one Clark, engaged in teaching school, was advanced on his wages by Porter, the treasurer of the school corporation, under an agreement that he should retain out of his wages, when earned, the amount advanced. It was held that this was a valid assignment in equity, and that a subsequent assignee of Clark could recover nothing until Porter was reimbursed. The principle of this case fully sustains the right of the appellant to recover, but whether he became the equitable assignee of the claims of the school teachers or not, he was entitled to recover for money paid to the use of the corporation.

That a public officer may not contract with himself is not to be doubted, but, like any other agent or trustee, he may, within the scope of his agency, when a necessity arises, advance money to save his principal or *cestui que trust* from inevitable loss or damage, or to pay just liabilities growing out of his agency, and for such advances, upon the same principle that any other agent may be reimbursed, he may be. Story Agency, section 335. Of course a public officer, as such, can not borrow money from himself, nor can he be reimbursed for money paid on contracts which he had no authority to make, nor to pay debts for which the corporation received no benefit, nor for advances made without a necessity therefor; but this record presents no case of the character supposed.

The judgment is reversed with costs, with instructions to the court to overrule the demurrer to the complaint, and to proceed in accordance with this opinion.

Filed June 12, 1885.

State, ex rel. Howard, v. Crawfordsville and Shannondale T. P. Co.

No. 12,318.

THE STATE, EX REL. HOWARD, PROSECUTING ATTORNEY,
v. THE CRAWFORDSVILLE AND SHANNONDALE TURN-
PIKE COMPANY.

102 283
150 102

CORPORATION.—Turnpike Company.—Consolidation.—Forfeiture.—Where a duly organized turnpike company, acting under the advice of counsel, effects a consolidation, under one management, of its property and franchises with the property and franchises of an intersecting company, and the common management acts for more than twelve years without question by the State, when, by legal proceedings, the consolidation is declared void, and each company thereupon assumes control of its own property and exercises its own franchises, and so continues to act for more than one year without objection, there is no forfeiture of its rights by such company.

From the Montgomery Circuit Court.

F. M. Howard, Prosecuting Attorney, *J. M. Thompson*, *W. B. Herod*, *W. H. Thompson*, *G. W. Stafford* and *J. H. Burford*, for appellant.

P. S. Kennedy, *S. C. Kennedy*, *G. W. Paul*, *J. E. Humphries*, *E. C. Snyder* and *W. W. Thornton*, for appellee.

HOWK, J.—This is an information in the nature of a *quo warranto*, in the name of the State, on the relation of Frank M. Howard, prosecuting attorney of the 22d Judicial Circuit, as plaintiff, against the Crawfordsville and Shannondale Turnpike Company, as defendant. The cause was put at issue and tried by the court, and, at the defendant's request, the court made a special finding of the facts and stated its conclusion of law thereon. Over the exception of the plaintiff's relator to the court's conclusion of law, judgment was rendered thereon for the defendant.

In this court the only error relied upon by the plaintiff's relator for the reversal of the judgment below is, that the trial court erred in its conclusion of law upon its special finding of facts.

The court found the facts of this case to be substantially as follows: On the 31st day of August, 1865, there were or-

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ganized under the statute the Crawfordsville and Darlington Turnpike Company, and the Crawfordsville and Shannondale Turnpike Company, each of which companies was a valid and legal corporation, with articles of association in due form, which articles of association of each of such companies were duly filed in the recorder's office of Montgomery county, wherein such companies were organized. Each company organized, elected the proper officers and obtained the consent of the board of commissioners of such county to construct its line of road upon the public highway described in its articles of association, which had been a public highway for fifty years continuously. Each corporation built its road; the Crawfordsville and Darlington Turnpike Company built six miles of road at an expense of \$10,000, and the Crawfordsville and Shannondale Turnpike Company built seven miles of road at an expense of \$12,000. After such roads were completed, to wit, on November 19th, 1866, the two corporations, by order of the board of directors of each corporation, attempted to consolidate themselves, and to assume the name of the Crawfordsville and Shannondale Consolidated Turnpike Company. The board of directors of each company agreed to such attempted consolidation, and so did all the stockholders of the two old corporations. The stockholders and directors of the old corporations had never issued any certificates of stock.

After the resolution was passed for the consolidation of the two corporations, the attempted consolidated turnpike company elected officers and took possession of such roads, and operated them, collected tolls and exercised all the rights of a corporation, and issued its bonds to the amount of \$6,300, the debt of the two old corporations; and such consolidated company held and operated such roads from the 19th day of November, 1866, until the 16th day of November, 1878. During all such time such roads were held by such attempted organization, statements were filed and taxes paid, tolls collected

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and the debts partly paid, and the roads were operated under such assumed corporate name.

On the 16th day of November, 1878, such attempted organization, the Crawfordsville and Shannondale Consolidated Turnpike Company, joined in articles of association with the Crawfordsville and Fredericksburg Turnpike Company (a duly and legally organized turnpike company of such county, which owned a road therein), and formed an attempted organization by the name of the Crawfordsville and Eastern Turnpike Company, under which name all of such roads were operated, and all the certificates of stock in the old companies were surrendered and cancelled, and, in lieu thereof, the attempted Crawfordsville and Eastern Turnpike Company issued other certificates. The attempted organization, the Crawfordsville and Eastern Turnpike Company, operated and held possession of such roads, had a board of directors, president and secretary, and assumed to act as a corporation, collected tolls, contracted and was contracted with, sued and was sued, and continued to act as a corporation until August, 1882, when the members of such organization and its board of directors held a meeting and abandoned such organization.

On the 9th day of May, 1879, the State of Indiana, on the relation of George W. Collings, Esq., then prosecuting attorney of the Twenty-second Judicial Circuit, filed an information in the nature of a *quo warranto* against the persons who were then claiming to be the officers, directors and stockholders of such attempted corporation, the Crawfordsville and Eastern Turnpike Company, which persons were the same persons then claiming to be the officers, directors and stockholders of the aforesaid Crawfordsville and Darlington, and Crawfordsville and Shannondale turnpike companies; and such cause was tried in the Montgomery Circuit Court, and judgment was there rendered therein in favor of such defendants and against the plaintiff's relator, and the relator appealed therefrom to the Supreme Court of this State, where such judgment was in all things reversed, and the opinion

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and judgment of the Supreme Court are reported under the title of *State, ex rel., v. Beck*, 81 Ind. 500. Thereafter, such cause was again submitted for trial to the Montgomery Circuit Court, on the 15th day of September, 1882, and it was then and there found, adjudged and decreed by such court that the defendants therein were guilty as charged, and were not a corporation under the name of the Crawfordsville and Eastern Turnpike Company, and that such pretended corporation was not legally organized, and there was no such corporation, and such defendants were enjoined from exercising any franchises as such corporation; that such corporation was illegal and void, and that such relator recover his costs of such defendants; which judgment and decree still remained in full force.

In August, 1882, the Crawfordsville and Darlington Turnpike Company, the Crawfordsville and Shannondale Turnpike Company, and the Crawfordsville and Fredericksburg Turnpike Company, each assumed control and elected officers and a full board of directors for each company, and each corporation took possession of the road originally held by it, and had since held possession and exercised full control over such road, collected tolls, built bridges and gravelled the roadway. When the Crawfordsville and Eastern Turnpike Company was dissolved, the stockholders in the original corporations, or the assignees of the original stockholders, by agreement divided up the interest claimed by each, and took such interest in the original corporation. From the time of the organization of the Crawfordsville and Shannondale Consolidated Turnpike Company down to August, 1882, the original corporations did not elect officers, nor hold any meetings, nor keep any books, nor make any debts, but they allowed all acts to be done by such consolidated turnpike company, until the formation of the Crawfordsville and Eastern Turnpike Company. In making such attempted consolidation, the officers, stockholders and agents acted under

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the advice of counsel. The defendant in this cause was one of such original corporations.

By the different attempted consolidations the defendant herein, under the advice of counsel, intended and attempted to put its road under one management. The road mentioned in the complaint herein and the other road connected with it, which were controlled by the Crawfordsville and Shannondale Consolidated Turnpike Company, intersected each other. Some of the stockholders were such in both the original companies, and the consolidation was attempted to put both their roads under one management. From the — day of —, 1867, the defendant herein suffered and permitted such pretended corporations, the Crawfordsville and Shannondale Consolidated Turnpike Company and the Crawfordsville and Eastern Turnpike Company, to occupy and control the line of road mentioned in the complaint herein, and to erect toll-gates and collect tolls from travellers thereon, and to appropriate all the proceeds thereof to the use of such attempted corporations. Since August, 1882, the defendant herein has had toll-gates erected across and over such highway, and has compelled travellers to pay tolls for travelling thereon, which toll-gates are obstructions to the travel on and free use of such public highway. Such line of road is a road largely travelled by citizens of Montgomery county, in going to and returning from the large and populous city of Crawfordsville.

As its conclusion of law upon the above found facts, "the court now finds for the defendant.

"(Signed)

WM. P. BRITTON, Judge."

Appellant's relator excepted to the court's conclusion of law; but he has in no way called in question, either below or in this court, the correctness of the facts specially found by the trial court. The relator admits, as the case is presented here, that the facts have been fully and correctly found by the circuit court, and presents for our decision this one question: Is there any error in the court's conclusion of law upon the facts so found? This is settled by the deci-

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sions of this court. *Cruzan v. Smith*, 41 Ind. 288; *Robinson v. Snyder*, 74 Ind. 110; *Schindler v. Westover*, 99 Ind. 395.

The relator earnestly insists, in argument, that the facts found by the court conclusively show that the appellee voluntarily abandoned its property and franchises, and permitted a stranger to take possession thereof, as long ago as the 19th day of November, 1866; that, for nearly sixteen years thereafter, or until August, 1882, the appellee was possessed of no property, had exercised none of the franchises of a turnpike company, and had not performed a single corporate act prescribed or required by the law of its being; and that, after such a lapse of time, the appellee could not lawfully possess itself of its property, so long unclaimed or abandoned, nor assume the exercise of its franchises as a turnpike corporation, so long neglected, discarded or virtually surrendered. This is the gist of the relator's argument, as we understand it, and it has the merit, at least, of ingenuity and plausibility. We can not agree, however, with the relator or his counsel, that the facts found by the court make any such showing as it is claimed they do; and, therefore, we have been unable to reach the conclusion that the trial court has erred, as the relator and his counsel claim, in its application of the law to the facts of this case.

The fundamental fact found by the court, and one that must not be lost sight of, in the consideration of this cause, is the fact that nearly nineteen years ago the appellee built its road seven miles in length, at an expense of \$12,000 to its corporators or stockholders. It was also found by the court, as a fact, that on and before the 19th day of November, 1866, the appellee was duly and legally incorporated as a turnpike company, in full possession of its road aforesaid, and in the lawful exercise of all the franchises of such a corporation. With these facts as the basis of this case, the question we are required to consider and decide, it seems to us, may be stated thus: Are the other facts found by the court such as would, or ought to, work a forfeiture of the ap-

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pellee's property and franchises, or as would justify the State in claiming, or authorize the courts to grant, a judgment of ouster and exclusion against the appellee, its officers and stockholders? In considering a similar question, in *Moore v. State, ex rel.*, 71 Ind. 478, the court said: "It should be the policy of the State and of its officers of all grades, as it seems to us, to foster and encourage in all legitimate ways the organization of turnpike and gravel road corporations, and the construction and maintenance of their roads. The rights, privileges and franchises of such corporations, we think, should not be declared forfeited, and they should not be ousted and excluded therefrom, except for solid, weighty and cogent reasons, for the violation of a positive and prohibitory statute, and not of a statute whose provisions are permissive and apparently directory, and never upon merely technical grounds." *Smelser v. Wayne, etc., Tp. Co.*, 82 Ind. 417; *State, ex rel., v. St. Paul, etc., Tp. Co.*, 92 Ind. 42.

With these views in mind, we are of opinion that the facts found by the court in the case in hand do not show that the interests of the public would be subserved by a judgment in favor of the State, declaring a forfeiture of the appellee's franchises, and ousting and excluding it from the possession of its road and other corporate property. Certainly, it is not shown in the special finding of facts that the appellee, or its stockholders, ever abandoned, or intended to abandon, its road or other property, or ever surrendered, or intended to surrender, any of its franchises to the State or to a stranger. Considering together all the facts found by the court, the utmost that can be said against the appellee or its stockholders is that, acting under the advice of counsel, the appellee and the Crawfordsville and Darlington Turnpike Company, a corporation owning a road intersecting the appellee's road, attempted to consolidate the property and franchises of the two corporations, and to place their two intersecting roads under the common management of a single board of directors, by

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the agreement and consent of the directors and stockholders of each of the two corporations.

This, the court found, was done, or attempted to be done, on the 19th day of November, 1866; and thereafter the appellee's road and the road of the other corporation continued, without objection or question by the State or any of its officers, or by any one else, under the management and control of a common board of directors, for more than twelve years. It was not found by the court, nor is it now claimed by the appellant's relator, that the rights of the State or the interests of the public were injuriously affected in any wise by the attempted consolidation of the property and franchises of the appellee with the property and franchises of the Crawfordsville and Darlington Turnpike Company, or by the management and control of the intersecting roads of the two corporations by a common board of directors. But, in the case of *State, ex rel., v. Beck*, 81 Ind. 500, mentioned in the special finding of facts, it was substantially held by this court that the attempted consolidation of such road corporations was not authorized by law, and was, therefore, void. Almost as soon, apparently, as this decision was announced, the attempted consolidated company fell apart, and each of the constituent corporations, acting under the advice of its counsel, assumed the possession of its corporate property and franchises, as the same were held and enjoyed by it and its stockholders before and at the time of such attempted consolidation.

This, the court found, was done by the appellee in August, 1882; that it then elected officers and a full board of directors, and took possession of the road originally held by it, and had since held possession and exercised full control over such road, collected tolls, built bridges and gravelled its roadway. These things were allowed to be done by the appellee and by its officers and stockholders, without any objection thereto by or on behalf of the State, or by any one else, for more than one year, or until the commencement of this suit, in the December term, 1883, of the trial court. It is claimed by the appellant's relator,

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as we understand his position, that the appellee had ceased to be a corporation, and had forfeited its corporate property and franchises, because it did not, during the continuance of the attempted consolidation, and before the same was declared illegal and void, keep up its separate organization, and separately exercise its corporate franchises. This position, we think, ought not to and can not be maintained. *Ketcham v. Madison, etc., R. R. Co.*, 20 Ind. 260.

Our conclusion is, that upon the facts specially found the trial court did not err in finding for the appellee, as its conclusion of law.

The judgment is affirmed.

Filed June 9, 1885.

No. 12,045.

ANGEVINE, ADMINISTRATOR, v. WARD, GUARDIAN.

SUPREME COURT.—*Practice.—Bill of Exceptions.*—Where exceptions to a guardian's report have been disallowed upon evidence, the ruling can not be questioned in the Supreme Court in the absence of a bill of exceptions containing the evidence.

From the Dearborn Circuit Court.

C. F. Hayes, for appellant.

J. K. Thompson, for appellee.

MITCHELL, C. J.—From the record before us, it appears that Isaac B. Ward was appointed guardian of the person and estate of James Angevine, a person of unsound mind. On the 6th day of December, 1871, he presented a report, as guardian, to the probate court. On the day following, James Angevine, one of the children of the ward, appeared and filed exceptions to the report. At the May term, 1872, the record shows that a trial was had, and, after hearing the evidence, the court sustained some of the exceptions and overruled others. On the 7th day of February, 1874, another re-

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port was filed by the guardian, to which exceptions were filed by the appellant. On the 20th day of June, 1874, the guardian, by leave of court, filed an amended report, to which exceptions were likewise presented. On the same day an additional report was filed by the guardian, and on the 29th of October, still another amended report was filed. To all of the reports exceptions were filed.

On the 25th of March, 1875, another trial was had on the issues presented by the several reports and exceptions thereto, and upon evidence heard, certain modifications were ordered to be made, and the reports were in other respects approved. On the 8th day of December, 1875, the court again heard testimony upon exceptions filed to the previous reports, and the reports were again in some particulars modified. From the orders there made an appeal was taken to this court, which was dismissed for the reasons stated in *Angevine v. Ward*, 66 Ind. 460.

On the 18th day of October, 1880, the guardian appeared and filed his final report. To this, exceptions were filed October 23d, 1880; additional exceptions April 26th, 1881, and still others on the 25th of November, 1882, and October 15th, 1883.

The record shows that on the 3d day of December, 1883, the matters in issue were submitted to the court for trial. Upon due consideration, the court made an order confirming the reports of the guardian and directing his discharge. To this the appellant, who had been meanwhile appointed administrator of the ward's estate, objected and excepted, and now again appeals.

No attempt has been made to set out any evidence whatever, either by bill of exceptions or otherwise, nor is there any other motion or pleading upon which any question is presented. Great care has been observed in exhibiting all the reports of the guardian, by copying what purports to be reports, with all the numerous vouchers filed with them into the record. The exceptions also, which there seems to have

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been no lack of diligence in filing, are all copied into the record, but as these were all disposed of on questions of fact presented to the court, and as there is none of the evidence in the record, there is, from first to last, no question presented for the consideration of the court. In the absence of any evidence or other ruling of the court presenting some question, we must presume the rulings of the court were right, and accordingly the judgment is affirmed with costs.

Filed June 18, 1885.

No. 11,721.

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SUBROGATION.—*Sheriff's Sale.*—A purchaser at a sheriff's sale upon an invalid decree of foreclosure, whose money goes to satisfy the mortgage, is entitled to be subrogated to the rights of the mortgagee.

SAME—*Volunteer.*—A purchaser at an invalid sheriff's sale is not a volunteer.

SAME—*Former Adjudication.*—*Mandate.*—A judgment against a purchaser at an invalid sheriff's sale, upon an application for a mandate to compel the sheriff to execute a deed, is not an adjudication upon the purchaser's right to subrogation.

STATUTE OF FRAUDS.—*Defence is a Personal One.*—The defence of the statute of frauds is a personal one and can not be made by strangers to the transaction.

FRAUD.—*Pleading.*—*Injury.*—Fraud without injury creates no cause of action, and in pleading fraud facts must be pleaded—not merely epithets—and an injury must be shown.

JUDGMENT.—*Receiver.*—*Collateral Attack.*—A judgment appointing a receiver can not be attacked collaterally.

PRACTICE.—*Special Finding.*—*Request.*—Where the special finding states that "the court, at the request of the defendants, makes a special finding of facts and conclusions of law," it is not necessary that the request should appear elsewhere in the record.

SAME.—*Harmless Error.*—It is better to keep the special and general findings separate, but where no injury is done by combining them, the error will be deemed a harmless one.

SHERIFF'S SALE.—*Delay in Payment of Bid.*—*Purchaser at Foreclosure Sale.*—*Subrogation.*—A party who has purchased land at a sale upon a decree

102	293
124	120
137	292
102	298
130	293
102	298
131	228
102	293
137	620
139	224
102	293
140	183
141	54
143	97
102	293
147	155
102	293
151	342
102	293
158	609
102	293
164	347
102	293
166	329

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of foreclosure, and who is denied a deed upon such sale, is not precluded from asserting a right of subrogation because of delay in paying the purchase-money.

From the Switzerland Circuit Court.

J. B. Coles, A. C. Downey and G. E. Downey, for appellants.
S. Carter, C. S. Tandy and W. R. Johnston, for appellee.

ELLIOTT, J.—The material allegations of the appellee's complaint are these: That on the 23d day of December, 1878, the defendant James F. Bodkin was indebted to the National Bank of Rising Sun in the sum of \$7,600, for which he had theretofore executed his promissory note, with James H. Merit as surety; that James F. Bodkin was also indebted to the First National Bank of Vevay in the sum of \$600, for which he had executed his promissory note, with James H. Merit as surety; that Bodkin was still further indebted to Sarah Woods in the sum of \$850, evidenced by his promissory note, on which James H. Merit was surety; that on the day Bodkin and his wife, Lodina H. Bodkin, executed to James H. Merit a mortgage on real estate to indemnify him against loss on account of his suretyship; that James F. Bodkin did not pay any of the notes except the one executed to Sarah Woods; that the National Bank of Rising Sun recovered judgment on the note executed to it against the principal and surety therein, on the 7th day of May, 1880; that the surety afterwards commenced suit to foreclose the indemnifying mortgage executed to him, alleging in his complaint, among other things, the execution of the note and mortgage, the failure to pay the note, the recovery of judgment thereon, the execution of the notes to the First National Bank of Vevay, that James F. Bodkin was insolvent, that the real estate described in the indemnifying mortgage was encumbered by a prior mortgage to the amount of \$5,300, and that it was not of sufficient value to pay that encumbrance and the amount due upon the judgment of the National Bank of Rising Sun; that James F. Bodkin had sold his personal prop-

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erty, retaining only the amount exempted by law, and had filed a schedule claiming it under the exemption law; that he had attempted to lease the mortgaged real estate and secure the rent in advance, and was endeavoring to place the property in the hands of his wife to avoid payment of rent. It is further alleged in the complaint in the present suit that the court, in the suit brought by the surety, James H. Merit, appointed John W. Powell a receiver to collect the rents accruing from the real estate; that a decree foreclosing the mortgage was rendered, sale made thereon, and the property purchased by the appellee on the 5th day of March, 1881; that the sheriff made a memorandum on the back of the certified copy of the decree; that the sheriff retained the copy of the decree without making a return thereon, and gave the appellee time to raise the purchase-money, and waited for the money during the life of the decree; that the sheriff tendered the appellee a certificate of sale, and requested the payment of the purchase-money, and not receiving it returned the decree not satisfied; that afterwards James H. Merit, the surety, moved for an order against the appellee to compel the payment of the purchase-money, less \$178.38, previously paid, and the court on said motion rendered judgment against the appellee for \$7,321, the unpaid balance of the purchase-money, and the money was paid by appellee, together with interest and ten per centum damages, on the 20th day of February, 1882; that after making this payment he demanded a deed; this demand was refused, and the appellee petitioned for a writ of mandate to compel the sheriff to execute the deed, but on the hearing the court refused the writ, on the ground that no sufficient written memorandum of the sale was made by the sheriff. The prayer of the complaint is that the appellee be subrogated to the rights of the mortgagee and judgment creditor, James H. Merit, that an order of foreclosure issue, and that sale of the mortgaged premises may be made.

The complaint makes a case entitling the appellee to subrogation. His money satisfied the debts of the mortgagors

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and paid the claims of creditors, and he has a right to the securities held by the mortgagor and creditors. It can make no difference to the mortgagors and debtors, that the appellee was unable to secure a deed from the sheriff; that fact does not work them any injury, nor does it impair the force of the payment of the debts which were owing from them, and not from the appellee. It is a familiar principle of equity, and is one fully recognized by our statute and decisions, that payment of a debt by a purchaser at an invalid sheriff's sale subrogates the purchaser to the rights of the creditor. The invalidity of the sale does not destroy the right of subrogation. It would be against good conscience and natural justice to permit mortgagors to hold property pledged for a debt against one who had paid their debt, expecting to secure a title to the land pledged as security for its payment. Our decisions are firmly set against such a doctrine as that upon which appellants' theory is founded. *Short v. Sears*, 93 Ind. 505; *Hines v. Dresher*, 93 Ind. 551; *Carver v. Howard*, 92 Ind. 173; *Jones v. French*, 92 Ind. 138; *Willson v. Brown*, 82 Ind. 471; *Ray v. Detchon*, 79 Ind. 56; *Reily v. Burton*, 71 Ind. 118; *Walton v. Cox*, 67 Ind. 164; *Muir v. Berkshire*, 52 Ind. 149; *Seller v. Lingerman*, 24 Ind. 264; *Bunts v. Cole*, 7 Blackf. 265; S. C., 41 Am. Dec. 226.

The delay of the appellee in paying the purchase-money did not deprive him of his right to subrogation. Mere delay in the payment of the purchase-money can not destroy the right of the purchaser to the liens securing the debt he pays, for the main facts upon which the right of subrogation rests remain, and the delay works the debtor no injury. Such a delay is not a wrong within the meaning of the maxim that no man can take advantage of his own wrong. The purchaser in this instance seeks no benefit from a wrong; what he seeks is to hold the same liens that were held by the creditors whose claims were paid by him.

A purchaser at an invalid sheriff's sale is not a volunteer. It is the right of the citizen to bid at sheriff's sales, and it is

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not for the debtors, whose debt the bidder's money pays, to denominate him a volunteer, or to deny his right to make the debt out of the property pledged for its payment. It can make no difference to the debtor who gets the property provided it goes in discharge of his debt; this is where he pledged it to go, and there is where equity decrees that it shall go.

The denial of the writ of mandate did not adjudicate upon the appellee's right to subrogation. There is no conclusive adjudication where there is neither an issue made nor an opportunity to make an issue embracing the subject of the litigation in the second action. In this instance there was no adjudication upon the matters in litigation here, because there was no issue formed upon the appellee's right to subrogation, nor was there an opportunity to form such an issue. The question in the action for a mandate was the appellee's right to compel the sheriff to execute a deed vesting title; here the question is as to the right of the appellee to be subrogated to the lien of the decree and to enforce it by the proper process.

There was no error in striking out parts of the appellants' cross complaint. Where a motion to strike out is sustained, there is no material error if the substantial averments are not rejected, and that is true here. So much of the cross complaint as charges the appellee with wrongfully entering into possession of the land, and appropriating the rents and profits, was not struck out, and the appellants were not harmed, because they were not deprived of the right to give evidence upon these subjects. If the right to give evidence upon these subjects, and to secure a judgment in the event that the evidence entitled them to one, had been taken from them, a different question would confront us, but enough remained in the pleading to fully secure these rights.

Some of the allegations in the part of the cross complaint struck out attempted to charge the appellee with fraud, but no facts are stated constituting fraud, although epithets are liberally used. Epithets can not supply the place of facts,

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and facts are absent from this pleading. It is true, that it is alleged that the judgment requiring the appellee to pay his bid was the result of a fraudulent collusion, but the facts stated do not support the pleader's conclusion. There is no averment that he did not make the bid; this fact is therefore conceded, and if he did make the bid, the execution creditor was entitled to judgment, and there could be no fraud in consenting that he might take it. There is, indeed, no averment that the sale was invalid, although there is a recital that it was ineffectual. But the whole body of the averments as to the fraud of the appellee was foreign to the general tenor of the cross complaint, and had no legitimate place in it. Doubtless, fraud properly pleaded would have been a good cause of counter-claim, but not in a paragraph proceeding, as this one did, upon an entirely distinct and different ground. The theory upon which, judged as it must be by the general scope and tenor, the cross complaint proceeded was, that the appellee was wrongfully in possession because he had no title, and was, therefore, accountable for the rents and profits.

The defence of the statute of frauds is a personal one, and in this instance the only one of the parties who could have made it available was the appellee. If he did not elect to interpose it against the execution debtor's demand, the appellants can not complain. *Savage v. Lee*, 101 Ind. 514; *Dixon v. Duke*, 85 Ind. 434, *vide* auth. p. 439; *Morrison v. Collier*, 79 Ind. 417.

It is a settled principle that fraud without damage gives no cause of action, and it is impossible to perceive how the appellants could have been injured even if it were true that there was a fraudulent collusion. In no event could they be injuriously affected. If the appellee does not own the lien, then the surety, James H. Merit, does and can enforce it, so that the appellants can not be injured, no matter who enforces the lien. They can not hold the property as against the debt for which they mortgaged it. Whatever view be

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taken of the ruling on the motion to strike out, it is evident that no substantial error was committed.

The second paragraph of the answer attempts to plead facts showing that the court erred in appointing the receiver in the suit instituted by James H. Merit. Of this answer it is only necessary to say that a judgment appointing a receiver can not be attacked in an answer to a complaint in a separate action praying for the enforcement of a decree of foreclosure.

The special finding made by the court states that "The court, at the request of the defendants Bodkin and wife, makes the following special findings of facts and conclusions of law thereon." This shows a request by the parties. It is not necessary that the request should be elsewhere set forth in the record, for clearer or stronger evidence of its having been made could not well be supplied than that furnished by the judge over his own signature. The case of *Grover and Baker S. M. Co. v. Barnes*, 49 Ind. 136, lends no support to the contention of the appellee that the record does not show that the special finding was made upon the request of the parties.

The court did not specifically state conclusions of law, but did state in general terms that the plaintiff was entitled to be subrogated to the lien of the mortgage and decree of James H. Merit. Immediately following this statement, and as part of the finding signed by the judge, is the final decree. It would have been more formal to have kept separate the conclusions of law and the final decree, but in this instance no injury was done the appellants. Upon the facts found the appellee was clearly entitled to subrogation, and the statement of this point was the statement of the central point of the case. This was the principal point, and the one that controlled the case from beginning to end. As this was stated against the appellants, and as the facts imperatively required such a conclusion, it is evident that no substantial injury resulted to them, and the statute forbids a reversal where there is no substantial injury. It is no doubt better in all cases to

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state separately and specifically all the conclusions of law; and there may be cases where it would be error requiring a reversal to do otherwise, but here there was no material injury to the appellants, and we are not authorized to reverse for the failure to proceed in due form unless substantial injury resulted from the course pursued.

The evidence is not in the record, and we must, therefore, accept as full and true the facts stated in the special finding. There is nothing in the finding that warrants the assumption of counsel that the court erred in ordering the money in the hands of the receiver appointed on the petition of the surety, James H. Merit, to be paid to the appellee. If the appellee was subrogated to all the rights of the mortgagee, then he became, from the time the right of subrogation accrued, entitled to the same rights as the person into whose place he was put by operation of law. The argument of appellants' counsel is, that when the appellee failed to pay his bid within season to secure a sheriff's deed, he forfeited all rights. This argument is unsound. The failure to pay the bid in season lost him the immediate title to the land, but it did not deprive him of his right of subrogation.

There are no facts stated from which it can be inferred that the order appointing the receiver was erroneously or even improvidently granted. As there is no fact impeaching the validity of the rulings of the court in the former case, we can not do otherwise than presume that they were correct; so that conceding, but by no means deciding, that the appellants can in this case question the validity of the order appointing a receiver, still there are no facts stated overcoming the presumption in favor of the ruling of the court.

Judgment affirmed.

Filed June 16, 1885.

Moyer et al. v. Brand.

No. 11,767.

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102	301
142	487
143	702
102	301
144	668
102	301
157	533

PROMISSORY NOTE.—Joint Makers.—Consideration.—Separate Defence.—Answer.—One of the joint makers of a promissory note can make the defence that as to him such note is without consideration, and an answer by him, admitting the signing of the note, but alleging that "as to him it was executed without any consideration whatever," is good. *Anderson v. Mecker*, 31 Ind. 245, and *Bingham v. Kimball*, 33 Ind. 184, distinguished.

SAME.—Pleading.—Practice.—Harmless Error.—If a separate answer by one of several defendants goes to the merits of the case, and is such that the proof of it will defeat a recovery by the plaintiff, it will enure to the benefit of the other defendants; but this rule will not render harmless an error in sustaining a demurrer to an answer by one of such other defendants who has the right to answer and defend separately.

PLEADING.—Sham Answer.—Practice.—Where an answer does not appear upon its face to be a sham, the question as to whether or not it is such should be raised in the manner provided by section 382, R. S. 1881.

From the Tippecanoe Circuit Court.

R. P. Davidson and *J. C. Davidson*, for appellants.

J. L. Miller, *J. R. Coffroth*, *T. A. Stuart*, *M. Jones* and *W. F. Severson*, for appellee.

ZOLLARS, J.—This is an action by appellee against appellants Moyer and Fretz, upon a joint promissory note which, on its face, purports to have been executed by them as joint makers. Each filed separate answers. One paragraph of Fretz's answer is that the note was executed without any consideration. One paragraph of Moyer's answer was, that as to him, the note is without consideration. To this answer the court below sustained a demurrer. This ruling presents the controlling question in the case. The rule is, that if a separate answer by one of several defendants goes to the merits of the case, and is such that the proof of it will defeat a recovery by the plaintiff, it will enure to the benefit of the other defendants. *Sutherlin v. Mullis*, 17 Ind. 19; *Stapp v. Davis*, 78 Ind. 128; *Kirkpatrick v. Armstrong*, 79 Ind. 384. Appellee, invoking the protection of this rule,

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contends that though the court may have erred in sustaining the demurrer to the paragraph of Moyer's answer, it is a harmless error, because he could have made the same defence under Fretz's answer. It is true that Fretz's answer goes to the whole cause of action, and, therefore, enured to the benefit of Moyer. Proof of that answer would have relieved him from all liability; but it does not follow from this that the sustaining of the demurrer to his answer is a harmless error. He had the right to answer and defend separately, and hence had the right to answer separately, that as to him the note is without consideration. This is a defence personal to himself, and such as he would not have had the right to make under Fretz's answer.

The defendants might have been unable to make out their defence under that answer, which averred an entire want of consideration for the note, and yet Moyer might have been able to show that as to him, personally, there is an entire want of consideration. Appellee construes the paragraph to mean that no money consideration passed to Moyer, but that construction is not the proper one. The statement in the plea is that as to him, Moyer, the note was executed without any consideration whatever.

We are forced to the conclusion that the court below erred in sustaining the demurrer to the first paragraph of Moyer's answer, and that the error is not a harmless one.

The case is before us without the evidence, upon the special finding of facts. We can not look to this special finding of facts to pronounce the error harmless, on the ground that the case has been disposed of upon its merits. If the answer had been allowed to stand, the evidence might have been different, and hence the special finding might have been different. Nor can we say from an inspection of the paragraph, or answer, and the record before us, that the error should be disregarded, because the paragraph embodied a sham defence. There is nothing upon the face of either that would justify such a conclusion. *Buskirk Pr. 191.*

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The paragraphs of Moyer's answer are not all upon the same theory; but this would not justify this court in holding that any particular one is a sham, since, in this State, parties may plead different defences. If appellee regarded the defence set up in the first paragraph of Moyer's answer as a sham defence, he should either not have demurred, or raised that question below in the manner provided in the statute. R. S. 1881, section 382. This section adopts the rule of practice as laid down in the cases of *Beeson v. McConnaha*, 12 Ind. 420, and *Love v. Thompson*, 86 Ind. 503.

A demurrer was also sustained to the second paragraph of Moyer's answer. It is not necessary that anything should be decided as to the sufficiency of that paragraph, because the same defence could have been made under the third paragraph, to which the demurrer was overruled.

For the error in sustaining the demurrer to the first paragraph of Moyer's answer the judgment must be reversed; and although we find nothing in the record which entitled Fretz personally to a reversal of the judgment, yet, as an affirmance as to him might embarrass appellee in the further prosecution of his claim against Moyer, the judgment is reversed as to both of the appellants, at the costs of appellee, and the cause is remanded, with instructions to the court below to overrule the demurrer to the first paragraph of Moyer's answer.

Filed May 25, 1885.

ON PETITION FOR A REHEARING.

ZOLLARS, J.—The note in suit is a joint promissory note, executed by appellants. The first paragraph of Moyer's separate answer, to which a demurrer was sustained below, is as follows: "He admits the signing of said alleged promissory note, but he says that as to him it was executed without any consideration whatever."

Upon the petition for a rehearing appellee's counsel say: "We respectfully submit that this was not a good answer; that it is imperfect and incomplete. The note was joint, and

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to make the answer good, the note must have been without consideration as to any of the makers. But we submit that argument is at an end, and the question of practice is no longer open in this State. *Anderson v. Meeker*, 31 Ind. 245, and *Bingham v. Kimball*, 33 Ind. 184, cited in *Favorite v. Stidham*, 84 Ind. 423, 427, are directly in point, and hold the answer bad."

In the case of *Anderson v. Meeker*, *supra*, the answer was, "that defendant received no consideration for said note." It was held that the answer was bad, on the ground that if the note had a consideration to support it, that was sufficient, whether received by the defendant or some one else with his consent.

In the case of *Bingham v. Kimball*, *supra*, the answer was that the note in suit "was given by this defendant to the plaintiff's assignors without any consideration of any kind to this defendant." The court, in speaking of the answer, said: "It was not necessary that the consideration for the note should pass to the defendant. The consideration must be some benefit to the party by whom the promise is made, or to a third person at his instance; or some detriment sustained at the instance of the party promising, by the party in whose favor the promise is made."

Neither of these cases is cited in the case of *Favorite v. Stidham*, *supra*; counsel were, perhaps, misled by the table of cases. They nevertheless state the law correctly as applicable to all similar cases. To plead that the defendant "received no consideration" for the note, or what is the same thing, that the note was given without consideration to the defendant, is manifestly insufficient for the reason, as stated in those cases, that a consideration may have moved to third parties with his knowledge and consent, or some detriment may have been sustained by the promisee. The difficulty with the answers in those cases was that they were too narrow. They put a limit upon the defence of no consideration, and restricted it to a want of consideration

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passing to and received by the defendant. If the answer under consideration were thus limited, the cases would be authority and conclusive, but clearly it is not so limited. The infirmity of appellee's argument is in assuming that the answer is thus limited. The averment in Moyer's answer that, "as to him, the note was executed without any consideration whatever," is not the same as the averment that *he* received no consideration, or that the note was given without consideration to him. Properly interpreted, Moyer's answer is, that so far as he was concerned, or so far as he was connected with the transaction, there was no consideration for the note. Not only no consideration moving to, or received by him, but no consideration "whatever;" no consideration to him, and no consideration in any manner to any one else. "As to him" limits the defence to him, but does not limit the want of consideration. The cases cited by counsel, therefore, do not overthrow the answer.

We can not agree with counsel that because the note is a joint one, to make the answer good the note must have been without consideration as to all of the makers. The note upon its face is a joint one. Presumably, both makers executed it at the same time, and upon ample consideration as to each and both. That presumption, however, is not conclusive. Under proper pleas, it may be shown that there was no consideration at all, or that there was a consideration as to one of the makers, and none at all as to the other. For illustration, we may suppose that the transaction from which the note resulted was entirely between appellee and Fretz; that it was entirely closed and completed, and that the note signed by Fretz had been delivered to appellee as a final settlement long before Moyer signed it; and that he signed it without any new consideration whatever. In such case, clearly, the note as to him would be without consideration, and just as clearly, he would have the right to make the defence under the plea, that as to him the note was without

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consideration. *Crossan v. May*, 68 Ind. 242; *Favorite v. Stidham*, *supra*; *Starr v. Earle*, 43 Ind. 478.

Many cases may arise where, as to one of the apparently joint makers of a note, the consideration may be ample, and as to the others entirely wanting. To hold that in such cases one of the joint makers can not make the defence of a want of consideration as to him, unless the defence is common to all, would be to bring us into collision with the cases last above cited, and into collision with the statutes and other cases. R. S. 1881, sections 366, 568.

The latter section provides that judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants. This section is the same as section 368 of the code of 1852, 2 R. S. 1876, p. 186, under which it was often held, that when justified by the proof, judgment might be rendered against one only of several defendants, although the action was upon a contract jointly executed by them. *Draper v. Vanhorn*, 12 Ind. 352; *Hubbell v. Woolf*, 15 Ind. 204; *Murray v. Ebright*, 50 Ind. 362; *Fitzgerald v. Genter*, 26 Ind. 238; *Stafford v. Nutt*, 51 Ind. 535. It would be a solecism to hold that a separate judgment may thus be rendered against one of several joint obligors upon the proof in the case, and at the same time hold that he can not plead his separate defence.

Upon this further examination and consideration, we have no doubt that Moyer had the right to plead separately that as to him the note is without consideration. Nor do we see in what his plea is "imperfect and incomplete;" a general answer of no consideration is sufficient. *Swope v. Fair*, 18 Ind. 300; *Barner v. Morehead*, 22 Ind. 354; *Billan v. Hercklebrath*, 23 Ind. 71; *Bush v. Brown*, 49 Ind. 573 (19 Am. R. 695).

It may be that Moyer will be unable to sustain his answer by proof, but that is a result we can not anticipate.

Petition for a rehearing overruled.

Filed June 23, 1885.

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No. 12,277.

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CONSTITUTIONAL LAW.—Schools.—Taxation.—Statute.—The statute empowering the school trustees of cities to levy a tax for tuition purposes is constitutional.

SAME.—Local Taxation.—Uniformity of Statutes.—General Laws.—Delegation of Power.—It is competent for the Legislature to delegate the power of assessing taxes for local school purposes to the inhabitants of the various localities, but the provisions of the law providing for such local taxation must be open to all school corporations of like character, and the statute must be general in its nature and operation.

SAME.—Legislative Power.—The provision of the Constitution, art. 8, sec. 1: "Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government, it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement, and to provide, by law, for a general and uniform system of common schools, wherein tuition shall be without charge, and equally open to all," does not require the Legislature to levy all school taxes, nor prohibit it from providing, by a general law, for the levying of school taxes by the local school authorities.

SAME.—General Laws.—Uniform System of Schools.—A system that secures to all the various subdivisions of the State equal and uniform rights and privileges, leaving only to the local authorities the right, under the law, to govern the local school affairs, is a general and uniform system, and a law providing such a system is a general law within the meaning of the Constitution.

SAME.—Right of Courts to Pass on Constitutionality of Statutes.—The power of the courts to declare a statute unconstitutional is a high one, is very cautiously exercised, and is never exercised in doubtful cases.

SAME.—Stare Decisis.—On constitutional questions the rule of *stare decisis* does not possess the same force as in ordinary cases.

SAME.—Cases Overruled.—*Greencastle Tp. v. Black*, 5 Ind. 557, and cases following it, in so far as they conflict with the present decision, are overruled.

From the Switzerland Circuit Court.

W. D. Ward, T. Livings and F. T. Hord, Attorney General, for appellant.

S. Carter and C. S. Tandy, for appellee.

ELLIOTT, J.—The appellee resists the collection of a tax

102	307
130	449
102	307
133	130
102	307
138	401
109	307
141	639
142	180
142	674
102	307
144	530
145	251
145	451
102	307
151	266
102	307
156	188
103	307
159	129
102	307
163	315
102	307
163	514
102	307
168	98

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assessed against his property by the common council of the city of Vevay, and, by his complaint, seeks an injunction restraining the treasurer from collecting it.

The complaint proceeds upon the theory that the statute authorizing common councils of cities to levy a school tax to be applied to the payment of the compensation of teachers employed in the common schools is in conflict with the Constitution, and void. The contention of appellee's counsel is, that taxes for tuition purposes must be levied by the Legislature, and that the authority to levy them can not be delegated to the local school corporations of the State.

An interpretation of the Constitution which frustrates one of its great and fundamental purposes can not be a sound one. The great and controlling duty of the courts when called upon to interpret the Constitution is to give effect to the intention of the people as expressed in the instrument. Cooley Const. Lim. (5th ed.) 68. This intention is not to be sought for nor gathered from isolated or detached parts of the Constitution, but from an examination of all of its provisions. Cooley Const. Lim. (5th ed.) 70. It is true that language is to be taken in its ordinary meaning, and that courts are to take, without addition or subtraction, the language employed by the people; but the sole office of language is to express the intention and purpose of the people, and from the language of the whole instrument the courts must gather and give effect to the purpose expressed. There can be no doubt as to the purpose of our people regarding common schools; both in the Constitution of 1816 and in that of 1851 are written provisions clearly expressing the purpose of the people to build up a great and beneficent system in which tuition shall "be without charge and equally open to all." The prime object sought is the creation of a system that shall be efficient and enduring. The best means adapted to this end are to be chosen, and all things that will tend to defeat this great purpose are to be put aside. We should wander far from our path of duty if we should give a meaning to the language of

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the people that would defeat what we know beyond all doubt was their leading purpose. Courts do not bend the Constitution when they give it the effect which the people intended it should have. We know that to hold that there must be for the whole State one law, governing alike populous districts and sparsely inhabited localities, making the same provisions for the one as for the other, would defeat the great purpose of the Constitution. No subtlety of argument nor ingenuity of invention can make it appear otherwise. It is simply and absolutely impracticable for a general law to justly and adequately provide for the necessities of all the governmental subdivisions of the State. It is possible, and only possible, to build up an efficient system by leaving local school matters, under proper general laws, to the people of the different localities. The Legislature have clearly realized this fact, and the law, now challenged, is an expression of their judgment and that of the people, for it has stood unquestioned for more than eighteen years. We do not affirm that this long acquiescence in the law establishes its constitutionality; but we do affirm that it supplies a strong reason in support of our proposition that the only way in which a great and efficient common school system can be successfully maintained is to entrust to the people of the different localities, by general laws, the government of local school affairs. We know this as part of the history of one of the most important institutions of our State, for we can not be ignorant of the fact that the schools suffered severely from a different system, and have greatly prospered under the present. With the plainly declared purpose of the people before us, and with the knowledge that the system which has prevailed for eighteen years has carried our schools to a high state of prosperity and usefulness, we should do a great wrong if, without the strongest reasons, we should overwhelm that system and compel the adoption of another which would shatter into inefficiency the whole common school system. If, however, the expressed intention of the people as written in the Constitu-

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tion required this of us, we should not hesitate, painful as it might be, to give effect to that intention ; but we are well satisfied that the instrument expresses no such intention.

The principal purpose of the constitutional provisions respecting common schools is so plain and prominent that it can not be mistaken, and there is nothing in the language employed, when justly interpreted, that requires the courts to decide anything hostile to that great purpose, but, if there were detached or isolated clauses that opposed the principal purpose, it would be our duty, under long settled rules, to make them yield to the plain intention of the framers of the Constitution. The closest analysis will fail to discover a word that clouds or obscures the controlling purpose of the instrument. The provision reads thus: "Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government, it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement, and to provide, by law, for a general and uniform system of common schools, wherein tuition shall be without charge and equally open to all." The provision that the Legislature shall "provide, by law, for a general and uniform system of common schools" does not mean that the Legislature must directly, and by a statute, levy all taxes for each locality, nor that they shall prescribe rules for every school district in the State. The reasonable interpretation of this language is, that the Legislature shall, by a general law, provide for conducting schools and securing revenues from taxation for their support through the instrumentalities of government. These instrumentalities are such political subdivisions as townships, towns and cities, and they are instrumentalities to which local governmental powers may be delegated. There is nothing in the language used that forbids the Legislature from employing these instrumentalities in securing revenues for the support of the common schools, for there is not a word in the entire article of

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the Constitution that, directly or indirectly, prohibits the Legislature from making use of these agencies of government in the administration of local school affairs. The nature of the subject and the language employed make it our duty to hold that there is no inhibition upon the power of the Legislature to delegate authority in local affairs to the proper local officers. If there is no denial of the right to delegate powers of local government it exists in the Legislature. Judge Dillon says: "In the absence of special constitutional restriction, the Legislature may confer the taxing power upon municipalities in such measure as it deems expedient; in other words, with such limitations as it sees fit." Again he says: "The legislative branch of the government has the exclusive power of taxation, but may delegate it, as above stated, to municipal corporations." 2 Dillon Munic. Corp. (3d ed.), sections 740, 741. Judge Cooley affirms this doctrine in strong words and cites a very great number of cases in which it was applied to school corporations. Cooley Const. Lim. (5th ed.), 225. We have in our own reports very many cases holding that local powers of government may be delegated, and to repudiate the doctrine would overturn a long line of decisions and unsettle a rule that has been regarded for more than a quarter of a century as the fixed law of the State. Not only would this be the result, but we should violate the fundamental principle that there are no restrictions upon the sovereignty of the Legislature except such as are expressly imposed by the Constitution. *Hedderich v State*, 101 Ind. 564, and authorities cited. There is certainly no express restriction in the Constitution upon the power of the Legislature to delegate authority in local school matters to the local officers, and we have neither the right nor the power to interpolate such a restriction in any case, and least of all, where it would operate to defeat one of the great purposes of the Constitution. The distribution of local powers to local authorities is one of the fundamental principles of our government, and it is a principle that

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has received the warmest praise from our own jurists and from other great thinkers, so that, in distributing local powers, the Legislature acts in strict conformity to the fundamental principles of our system of government. 2 Kent Com. (12th ed.) 275; 1 Dillon Munic. Corp. (3d ed.), section 11, n. 1. This doctrine has been recognized by this court in its broadest extent. *Justice v. City of Logansport*, 101 Ind. 326; *City of Aurora v. West*, 9 Ind. 74. It can not be doubted that the Legislature may delegate to local officers the power to make rules for the government of local schools and levy taxes for their support, and, if this be true, it necessarily results that it is a valid exercise of power to enact a statute for that purpose. If a valid statute is enacted committing to the local officers the power to govern schools and raise revenues for their maintenance, the Legislature does provide for a system of common schools "by law," and this is what the Constitution requires. Public corporations are instrumentalities of government through which the Legislature may act, and the acts of these agencies of government in obedience to the statute are the acts of the State. *Justice v. City of Logansport*, *supra*, and authorities cited. When, therefore, the Legislature makes proper provision for the management of school affairs by local officers, they do "provide by law" for a system of common schools.

We have ascertained and decided that when the Legislature makes provision for the government and support of the common schools by providing suitable machinery and committing the details of its operation to local officers, they do "provide by law" for a system of schools, and all that remains is to ascertain and determine whether the system provided is a "general and uniform" one.

A system which grants to all the various subdivisions of the State equal and uniform rights and privileges, leaving only to the local authorities the right to govern the local affairs, is a general and uniform system. The system itself is general and uniform, although the local officers of different localities

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may not administer the details of the system upon the same plan. The fact that there is a difference in the methods of local government does not prove that the system is not a general and uniform one. It is impossible to logically maintain that a system which confers upon all localities alike the power of governing and maintaining schools is not a general and uniform system. Where there is no discrimination made in favor of one subdivision or against others, there is neither want of uniformity nor is the system any other than a general one. Where the right of local government of schools is conferred upon all the school subdivisions upon the same terms, there is nothing special in the statute, nor is there any break in the line of uniformity. The right that the statute grants is made free to all ; its privileges are denied to none, and its benefits are open to all localities. It is difficult, if not impossible, to perceive the shadow of a reason for characterizing the system as wanting in uniformity or generality. If the system adopted is uniform and general, then the requirement of the Constitution is fully complied with, and all is done that it is incumbent upon the Legislature to do. Their work was accomplished, and well accomplished, when they "provided, by law, for a general and uniform system of common schools, wherein tuition shall be without charge, and equally open to all." It would be absolutely impossible for the Legislature to do more than provide by law for a general and uniform system of common schools, for they could not prescribe the details for the government of each school district in the State ; they could not devise a scheme that would meet the wants and necessities of each district, for this would require them to determine the size of the school-houses, the character of the appliances and furniture, the quantity of fuel that should be consumed, the number of teachers that should be employed, and, indeed, to make provision for the purchase of the smallest things needed for use in the schools, down to the chalk used in the blackboard exercises. The people never meant that the Legislature should undertake to do such an impracticable

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thing; all they meant was that the system should be general and uniform in the sense that its privileges and benefits should be extended upon the same terms and conditions to all the school districts of the State, and their meaning is well expressed in their Constitution. When the Legislature, by a general law, left the local school government, upon the same terms and conditions, to all the school districts of the State of like character and condition, they did provide by law for a general and uniform system, and so have not disobeyed the command of the people. Our conclusion is fortified by most ample and satisfactory authority. In speaking of a provision of the Constitution of a similar import to the one under immediate discussion, it was said: "This does not mean that the rate of assessment shall be uniform and equal for all purposes throughout the State, *City of Richmond v. Scott*, 48 Ind. 568; but it clearly does require a uniform and equal rate throughout the locality in which the particular tax is levied; if for State purposes, then in all parts of the State alike; if for county purposes, in the entire county; and so in township, town or city, for the local purposes of each." *Loftin v. Citizens Nat'l Bank*, 85 Ind. 341.

In the *City of Richmond v. Scott*, *supra*, this was the language of the court: "The constitution, article 10, section 1, provides, that 'the General Assembly shall provide by law for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal,' etc. Without deciding whether this provision of the constitution, if it applied to municipal taxation, would be violated by the law in question, we are of opinion that the provision can have no reference to municipal taxation. There can not, in the nature of things, be a uniform rate of taxation for municipal purposes. Taxes for corporate purposes can not be equal. The wants and necessities of towns and cities can not be equal. Some require a higher and some a lower rate of tax-

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ation. * * * We are of opinion therefore, that the law is not unconstitutional."

More directly applicable to the case under examination is the reasoning in *Kent v. Town of Kentland*, 62 Ind. 291, where it was said: "The main question presented—indeed the only one discussed in the appellant's brief—is the constitutionality of the law under which the tax is sought to be collected. The constitution requires, that 'the General Assembly shall provide by law for a uniform and equal rate of assessment and taxation.' Art. 10, sec. 1. It is contended by the appellant, that the law in question does not provide a 'uniform and equal rate of assessment and taxation.' The law under which the tax is assessed, cited above, provides, that 'persons residing outside of any such city or town and electing to be transferred to such town or city for educational purposes, or who shall send their children to the school taught in any such building, shall, with their property, be liable to such tax as if they resided in such city or town, on all property owned by said person in the township where such city or town is located.' The 16th section of the common school act provides, that, when persons can be better accommodated at the school of an adjoining township, incorporated town or city, they may, upon request, be transferred for educational purposes to such adjoining school. Section 17 provides, that each person so transferred may be taxed for the benefit of the school they so enjoy, points out the method by which he may be so taxed, and declares that the payment of such tax shall 'release his property from special school tax, in the township in which he resides.' 1 R. S. 1876, p. 785. The later law, above quoted, under which the tax in question was levied, provides, that those who send their children to such adjoining school shall be so taxed, as well as those who are transferred for educational purposes. We can see nothing unconstitutional in any of these acts. They are 'uniform and equal' in the rate of assessment and taxation, operate throughout the State, and upon all persons in the same circumstances,

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alike. Of course, the facts upon which these laws act are not equal and uniform, but continually vary; and a municipal law can no more act without facts, than the law of gravitation can act without matter. The laws, by which counties and townships levy and collect taxes for their own use, are uniform and equal, yet the rates of assessment and taxation in one county or township, as compared with another county or township, are not uniform and equal, and may vary from year to year. Those changes, in fact, do not affect the uniformity and equality of the law." In *City of South Bend v. University of Notre Dame*, 69 Ind. 344, the validity of a statute authorizing a city to levy a school tax was unhesitatingly sustained, and no mental vision, however keen, can discern any difference between that case and the present, yet it only expresses the principle decided in all our cases except the very few that follow *Greencastle Tp. v. Black*, 5 Ind. 557. We have cases directly upon the constitutional provision under immediate mention which it is impossible to distinguish in principle from the present. We refer to those cases which hold that local officers may levy taxes for building and equipping school-houses. The result of these cases is thus stated in *Root v. Erdelmeyer*, 37 Ind. 225, where WORDEN, C. J., speaking for the court, said: "Thus each civil township in the State, as well as each incorporated city and town, is made an instrumentality by means of which the educational purposes of the State are carried out. But when taxes are assessed by means of these instrumentalities, for building school-houses, they are assessed for school or educational purposes, and not for municipal purposes." This is a full declaration of the whole principle that rules here, and it is logically impossible to doubt its soundness. There are behind that case many decisions affirming the principle there given expression. *Adamson v. Auditor, etc.*, 9 Ind. 174; *Rose v. Bath Tp.*, 10 Ind. 18; *City of Lafayette v. Jenners*, 10 Ind. 70; *Conwell v. O'Brien*, 11 Ind. 419; *Covington, etc., Co. v. Auditor, etc.*, 14 Ind. 331; *Nill v. Jenkinson*, 15 Ind. 425.

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If it be true that the local authorities may be invested with authority to levy taxes to build school-houses, then it must also be true that they may be invested with authority to levy taxes to employ teachers, for it is not possible to make any distinction between the right to employ persons to impart instruction to the pupils and the right to provide places where the instruction shall be imparted. If the power to levy a tax to provide places exists, so, also, must the power to employ persons to make use of the places provided. No reason can be imagined why it is not a violation of the Constitution for the Legislature to delegate to the local authorities power to levy taxes to build and equip school-houses, and yet is a violation to delegate the power to levy taxes to pay the teachers who are to make use of the houses. There is no just ground for severing the provision of the Constitution and asserting that a statute which authorizes local officers to levy a tax to build and equip school-houses is valid, and one authorizing the local officers to levy a tax to pay teachers is void. The truth is that in neither case is the statute in conflict with the Constitution; but if in one case, so in both. There is not the remotest implication in the Constitution authorizing the conclusion that there is a difference between the right to levy taxes for the purpose of erecting houses for the accommodation of the pupils, and the right to levy taxes to pay teachers for instructing them, and the court has no power to create such an implication. The act of teaching implies a place to teach as well as a teacher. Both the teaching and the place where instruction is imparted are embraced within the language of our Constitution, and the two things are so closely blended that they can not be separated. If the teacher of a private school were to send to the father of one of his pupils an account for tuition, and afterwards a bill for use of the place where the school was conducted, the position of the teacher would, in principle, be precisely the same as that occupied by those who affirm that the power to levy a tax to

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erect school-houses may be delegated, but the power to levy a tax to pay teachers can not be.

The Constitution declares in very emphatic terms the duty of the Legislature respecting common schools, and the failure of that body to use all suitable means to build up and maintain the system would unquestionably be a grave breach of duty; but the Constitution does not deny the right to the Legislature to select the means of building up and encouraging schools. The provision of the Constitution is that "it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement, and to provide, by law, for a general and uniform system of common schools." This provision imperatively enjoins the general duty upon the Legislature, but leaves to them much discretion as to the selection of means for the efficient performance of that duty, and if the local agencies of government are employed to assist in building up the school system, there is no evasion of duty by the Legislature. The Legislature may, in their discretion, support all the schools of the State by means of a general levy directly made by a legislative act, or they may thus provide for part of the expense of maintaining the schools, or they may delegate to local officers the power to levy such taxes as in their judgment may be needed to supply the wants of the local schools and make them useful and effective. The duty rests on the Legislature to adopt the best system that can be framed; but they, and not the courts, are to judge what is the best system. There is this limitation on the legislative power, the system must be "a general and uniform one," and tuition must be free and open to all; but the extent of this limitation is this, and nothing more: The Legislature can not make an unequal distribution of money derived from a general levy, make an unequal general levy, or grant to some school corporations benefits or rights withheld from others. This is the general and uniform system contemplated by the Constitution.

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The power to declare a statute void on the ground that it is in conflict with the Constitution, is peculiar to the American courts, and the doctrine established by our cases is not found in other systems of jurisprudence. The early cases upon this subject show that the courts at first asserted this doctrine with much hesitation, and there are still some writers who deny the existence of the power, but it is now firmly fixed in our law. *Commonwealth v. Caton*, 4 Call (Va.) 5; *Turner v. Turner*, 4 Call, 234; *Kemper v. Hawkins*, 1 Va. Cas. 20; *United States v. Todd*, 13 How. 52 n.; *Marbury v. Madison*, 1 Cranch, 137; 1 Kent Com. 453. The power is one of the highest possessed by any judicial tribunal in the world, and is, as all the authorities agree, to be exercised with the utmost care and only in the clearest cases. If there is doubt in the mind of the court as to the validity of the statute, it must be resolved in favor of the Legislature. It devolves upon the party who assails a statute on the ground that it violates the Constitution to show a clear violation and to point out the provision violated; failing in this, his attack is unavailing. The courts are reluctant to declare statutes unconstitutional because of the high power they assert in doing so, and because of the respect which is due to the judgment of one of the co-ordinate departments of government. In exercising this power the courts necessarily overthrow the judgment of the Legislature that enacted the statute and of the chief executive who approved it, and it is just that they should assert the power only in very clear cases. This consideration leads to the conclusion that courts should overrule their own decisions rather than assume a power which places them above the executive and legislative departments of the government, in cases where investigation has convinced them that their former decisions were erroneous. Much less evil will result from a departure from former decisions than from an assumption of so great a power as that of declaring statutes unconstitutional. The rule of *stare decisis* has not been held not to apply with its usual force and vigor to decisions upon

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constitutional questions. In a case not unlike the present it was decided that "The rule of *stare decisis* applies when a decision has been recognized as a law of property, and conflicting demands have been adjusted, and contracts made with reference to and on faith of it; but not to questions involving the construction and interpretation of the organic law, the structure of the government, and the limitations upon the legislative and executive power." *Willis v. Owen*, 43 Texas, 41. Another court announces a similar conclusion and assigns this, among other reasons, for its conclusion: "That upon a constitutional question as to which we have no doubt, we can not follow a former decision against our present conviction, for the reason that to do so would violate our oath to support the constitution." *Kneeland v. City of Milwaukee*, 15 Wis. 454, p. 692.

Here we are not embarrassed by the consideration that property rights have been acquired on the faith of the decision in *Greencastle Township v. Black*, *supra*, for it is now more than eighteen years since the statute under examination was enacted, and for all these years it has stood as the unquestioned law of the land. Much greater disturbance would be produced in returning to the decision in that case than in acquiescing in the decision of the executive and legislative departments of the government so long approved by our people. But more than this, we have had since 1857 a decision adverse in principle to the doctrine of *Greencastle Township v. Black*, *supra*, and many other decisions of more modern date clearly hostile to it. In truth, an assertion now of the doctrine of that case would unsettle the law upon the subject of drainage, of roads, of courts, and upon a great many other subjects, for, in deciding constitutional questions involving the meaning of provisions of a similar import to the phrase "a general and uniform system," the court has taken a very different view from that asserted in the case of *Greencastle Township v. Black*, *supra*. We can not cite all of the cases

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bearing upon this general subject, but content ourselves with adding to those already cited the following: *Combs v. State*, 26 Ind. 98, see p. 99; *Clem v. State*, 33 Ind. 418, p. 421; *Gentile v. State*, 29 Ind. 409; *State v. Tucker*, 46 Ind. 355; *Cory v. Carter*, 48 Ind. 327 (17 Am. R. 738); *Kelly v. State, ex rel.*, 92 Ind. 236; *Wishmier v. State*, 97 Ind. 160, auth. p. 162; *State, ex rel., v. Gray*, 93 Ind. 303; *Mount v. State, ex rel.*, 90 Ind. 29 (46 Am. R. 192); *Gardner v. Haney*, 86 Ind. 17; *Sauer v. Twining*, 81 Ind. 366; *State, ex rel., v. Board, etc.*, 101 Ind. 96.

It will be clear to any one who studies our cases that the decision in *Greencastle Township v. Black, supra*, has long since been overruled in so far as it denies the power of the Legislature to empower school corporations to levy what is called a tuition tax, and all that it is incumbent upon us to do here is to announce as the result of these decisions, that it is overruled in so far as it asserts a doctrine inconsistent with them. If, however, the decision was not in principle overruled by the cases to which we have referred, we should nevertheless feel it our duty to overrule it now, because we are convinced that in the respect indicated it was not well decided, and for the reason that the statute now in force has been so long and uniformly acquiesced in that we ought not to return to the doctrine of that case unless quite well satisfied of its soundness; nor, as we have shown, are we embarrassed by any of the considerations which generally make courts reluctant to depart from former decisions. There is another point in *Greencastle Township v. Black, supra*, which was the controlling one, and upon which the conclusion might perhaps have been rested, and it was really not necessary to the decision of the case before the court to decide the question which is here the dominating one. The point to which we refer was that decided in *Maize v. State*, 4 Ind. 342, namely: "The law-making power being vested by the Constitution of 1851 in the General Assembly, the exercise, by any other

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body, of the power to make, sanction, suspend, or give effect to, the laws is necessarily excluded."

Judgment reversed, with instructions to sustain the demurrer to the complaint.

Filed June 18, 1885.

No. 11,723.

THE EXCHANGE BANK v. AULT ET AL.

JUDGMENT.—*Collateral Attack.*—*Presumption.*—*Pleading.*—Where a judgment is attacked collaterally by any pleading, all reasonable presumptions will be indulged in favor of its validity, and the facts alleged must be such as will overcome them.

SAME.—*Notice of Pendency of Action.*—Where a party seeks, by complaint or cross complaint, to impeach the judgment of a court of superior jurisdiction, on the ground that he had no legal notice of the pendency of the action in which it was rendered, he must allege what, if anything, is shown by the record in relation to the issue and service of process on him.

SAME.—*Jurisdiction.*—Where a court has jurisdiction of the subject-matter, it will be presumed, in the absence of any showing to the contrary, that it acquired jurisdiction of the person before rendering judgment.

SAME.—*Collateral Attack by Party to Record.*—Where a party to a judgment seeks to impeach its validity and have it declared void, in a subsequent action, by the allegation of facts *dehors* the record and not apparent on the face of the judgment, such an attack is a collateral one, and can not be made by a party to the record.

From the Owen Circuit Court.

S. O. Pickens and *I. H. Fowler*, for appellant.

W. R. Harrison, *W. E. McCord* and *J. C. Robinson*, for appellees.

Howk, J.—The appellant, the Exchange Bank, as plaintiff, commenced this action against the appellees, Henry J. Ault, Elizabeth Ault, Thomas B. Ault and Mary A. Ault, as defendants. Appellant's complaint, as filed, contained two paragraphs; but, before the trial of the cause, the first paragraph was withdrawn, and it need not be further noticed. In its

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second paragraph of complaint appellant alleged that it and the appellees were the owners in fee simple and tenants in common of certain described real estate in Owen county; that no person or persons, or corporation, other than appellant and the appellees, had any interest in or title to such real estate, or any part thereof, in possession, remainder, reversion or otherwise; that appellant was the owner of the undivided two-thirds part of such real estate, and that the appellees were the owners of the residue thereof. Wherefore appellant prayed for partition, etc.

The appellees jointly answered by a general denial of the complaint; and the appellee Thomas B. Ault separately filed a cross complaint in four paragraphs. Appellant's demurrer was sustained as to the first paragraph, and overruled as to the second, third and fourth paragraphs of such cross complaint, and these latter paragraphs appellant answered by a general denial. The issues joined were tried by a jury, who afterwards returned into court a special verdict. The appellee Thomas B. Ault moved the court for a judgment in his favor on the special verdict; and pending such motion appellant moved the court in writing "to render a special finding of its own in writing of the facts, from the evidence in the cause, upon which to give its conclusions of law and render judgment herein." Appellant's motion was overruled by the court, and the motion of appellee Thomas B. Ault was sustained by the court, and judgment was rendered accordingly.

The first error of which appellant complains is the overruling of its demurrer to the second, third and fourth paragraphs of Thomas B. Ault's separate cross complaint.

In the second paragraph of his cross complaint Thomas B. Ault alleged that he was the owner in fee simple, in his own right, of the land described in appellant's complaint; that the only claim of the appellant in or to such land consisted in a judgment and decree of the court below, rendered on the 18th day of December, 1877, in an action wherein appellant was then plaintiff and Thomas B. Ault was defendant, and

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wherein it was set forth that appellant had recovered, before that time, in such court a certain judgment against Henry J. Ault and one George White, and that Henry J. Ault had, before that time, fraudulently conveyed such land to Thomas B. Ault to defraud his creditors, and in which action such decree was rendered upon a pretended default of Thomas B. Ault to answer and defend such action; that such decree was to the effect that such land of Thomas B. Ault was subject to and should be sold to satisfy such judgment against Henry J. Ault and George White, and there was a pretended sale under such decree to the appellant of such land, and a deed by the sheriff of Owen county to appellant, in pursuance of such sale.

And Thomas B. Ault averred that appellant ought not to have or maintain this action, or any benefit or advantage of, or right or claim under, its aforesaid decree or the sheriff's sale or conveyance of such land, because, he said, appellant's aforesaid action against him was begun for the purpose of secretly and without his knowledge procuring an advantage of him and securing, in like manner and without his knowledge, a lien upon his land; that, in pursuance of this purpose, the appellant, on the 18th day of December, 1877, though it well knew that Thomas B. Ault had no knowledge of the commencement or pendency of such action, and well knew that he was the owner in good faith of such land, and that neither George White nor Henry J. Ault had any interest therein, and that Henry J. Ault had not fraudulently conveyed such land to him to defraud his creditors, but intending thereby to cheat and take from him his land, unjustly and without cause, caused such decree to be entered against him as by default; that, in further pursuance of such purpose, the appellant, well knowing that if Thomas B. Ault had information of such action or decree within two years from and after the rendition thereof, he would have caused and had the same to be set aside, caused and permitted such decree to remain without any proceeding thereon, until the — day of February,

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1881, and kept him in ignorance during all that time of such action and decree, and thereby prevented him from making application to have the same set aside; that, in fact, as appellant well knew, no summons or other notice was ever, at any time, given Thomas B. Ault of the aforesaid action to subject his land to sale on appellant's judgment against Henry J. Ault and George White; and that he had no knowledge or notice of such decree to sell his land until long after its sale thereunder, and more than three years after the pretended entry thereof; that such land belonged to Thomas B. Ault absolutely, when such decree was rendered and the sheriff's sale thereof made, and Henry J. Ault or George White had no interest therein, and neither of them had conveyed such land to him to defraud their, or either of their creditors. Wherefore Thomas B. Ault prayed judgment that appellant's decree against him of December 18th, 1877, be set aside as fraudulent and void, together with all proceedings thereunder, that he be adjudged the fee simple owner of such land, and that appellant be enjoined from setting up claim thereto or lien thereon by reason of such decree or sale thereunder, and for all other proper relief.

Of the third paragraph of Thomas B. Ault's cross complaint, which is "the ordinary paragraph for quieting title," in their brief of this cause, appellant's counsel say: "We think it is good." We need not, therefore, notice this third paragraph further, in this connection.

The fourth paragraph of such cross complaint contains all the allegations of the second paragraph, in substantially the same language; and, as we have given a full summary of the second paragraph, these allegations need not be repeated here. The fourth paragraph also stated some additional matters, which are not found in the second paragraph, namely: That appellant concealed the rendition of its decree from the cross complainant, for more than four years thereafter, and kept him in ignorance thereof until the commencement of this action, by withholding process thereon during that time, and

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removing the papers and records in the aforesaid cause from the office of the clerk of such court; that after the rendition of its decree, appellant treated and acknowledged such land as the property of the cross complainant, by causing the same to be levied on as his property; that long prior to the time of the execution of Henry J. Ault's deed to the cross complainant, which deed, appellant alleged, was executed to defraud the creditors of Henry J. Ault, the cross complainant had been the owner and in the possession of the land described in such deed and in the cross complaint and in appellant's complaint; that prior to the execution of such deed, Henry J. Ault had been the owner and in the possession of an adjoining tract of land of about equal quantity and value as that of cross complainant; that prior to the execution of such deed, the paper and record title to all such lands had been in the names of Henry J. Ault and Thomas B. Ault jointly, and that the deed of Henry J. Ault to the cross complainant was executed at the same time with a deed by the latter to Henry J. Ault of such adjoining tract, to confirm and carry out a partition previously made between them; and that the appellant well knew all the facts aforesaid at the time it commenced its aforesaid action and procured the entry of such decree therein. In this fourth paragraph, the cross complainant prayed judgment that the default and decree against him, in appellant's previous suit, might be set aside and he be permitted to defend such suit to set aside his deed, etc.; that appellant might be forever enjoined from enforcing such default and decree, and from claiming title to such land or any part thereof by virtue of the sale and deed under such decree; that the cross complainant be adjudged the absolute owner of such land, and for all other proper relief.

It is at least doubtful, as it seems to us, whether the matters alleged in either the second or fourth paragraphs of Thomas B. Ault's cross complaint, in this cause, can be regarded as proper matters of counter-claim or cross complaint in such

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an action. But, waiving this point, we will consider and decide the question presented by the ruling upon appellant's demurrer and the error assigned thereon, whether or not the facts stated in either the second or fourth paragraphs of the cross complaint are sufficient to show that the decree, of which Thomas B. Ault complains, is absolutely void for the want of process or the service thereof. It is manifest, we think, that each of these paragraphs of cross complaint were pleaded by the cross complainant for the purpose of showing that the decree of the court, under which the appellant claimed title to the land in controversy, was absolutely void. Of course, the cross complainant's attack upon the validity of such decree is a collateral attack, and unless the facts stated by him, in the paragraphs under consideration, are sufficient to show that the decree was and is void, the paragraphs are bad, and the demurrers thereto ought to have been sustained.

In considering such questions, every presumption is indulged in favor of the validity of the judgment or decree sought to be impeached; and where its validity is called in question in or by any pleading, the facts stated therein must be such as will overcome or exclude all reasonable presumptions in its favor. Where a party seeks, by complaint or cross complaint, to impeach the judgment or decree of a court of superior jurisdiction, upon the ground that he had no legal notice of the pendency of the action wherein such judgment or decree was rendered, it is necessary that he should allege in his pleading what, if anything, is shown by the record in relation to the issue and service of process on him in such action. The Owen Circuit Court had jurisdiction of the subject-matter of such action, and we are bound to presume, in the absence of any averment to the contrary, that the court had acquired jurisdiction of the person of the cross complainant, before it rendered the decree against him, which he asked the court, in the pending suit, to set aside

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and declare void. If the record of the former action shows, as we must presume that it does in the absence of any allegation to the contrary, that the court below had acquired jurisdiction of the person of Thomas B. Ault by the issue and service of a summons on him in such action before it entered the default and decree against him therein, of which he now complains, it is certain, we think, that he can not impeach or avoid such judgment or decree in this collateral suit.

We have given the substance of the second and fourth paragraphs of the cross complaint, almost in the language of the pleader. It will be readily seen therefrom that Thomas B. Ault did not allege, in either of such paragraphs, that a summons had not been issued for him in the former action, requiring him to appear and answer appellant's complaint therein, nor that such summons had not been duly and legally served on him, in the manner required by law, the proper time before he was defaulted and the decree was rendered therein, which he asks to have set aside and declared void. In the absence of such allegations, we must presume that a summons was duly served on Thomas B. Ault in such former action; that such summons was legally served on him by the proper officer; that proof of such service was made to the satisfaction of the court before the rendition of the decree therein, and that all these facts are shown by the record of such action. With the presumptions which must be indulged in favor of the validity of the decree, and in the absence of averments to the contrary, it is clear, we think, that neither of the paragraphs of the cross complaint we are now considering stated facts sufficient to constitute a cause of action against the appellant, or to entitle Thomas B. Ault to the relief demanded therein.

We have said that, in each of the second and fourth paragraphs of his cross complaint, Thomas B. Ault has made a collateral attack upon the validity of the decree rendered against him in the appellant's former action. He has not

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averred, in either of such paragraphs, that any of the facts stated therein, upon or by reason of which he claims that the decree in the former action is void and should be set aside, are shown in any manner in or by the record of such action. In the absence of any such averment we are bound to presume, in aid of such decree, that none of the facts stated are shown in or by such record; and that such record is regular and not defective in any particular. Where a party to a judgment or decree seeks to impeach its validity and have it declared void, in a subsequent action, by the allegation of facts wholly *dehors* the record of such judgment or decree and not apparent on its face, such an attack upon its validity is a collateral attack. *Reid v. Mitchell*, 93 Ind. 469; *Rogers v. Beauchamp*, *ante*, p. 33. It is settled by many decisions of this court that such an attack upon the validity of a judgment or decree can not be made by a party to the record. *Reed v. Whitton*, 78 Ind. 579; *Oppenheim v. Pittsburgh, etc., R. W. Co.*, 85 Ind. 471; *Smith v. Hess*, 91 Ind. 424; *Young v. Wells*, 97 Ind. 410; *Smith v. Clifford*, 99 Ind. 113.

For the reasons given, we are of opinion that the court erred in overruling appellant's demurrers to the second and fourth paragraphs of Thomas B. Ault's cross complaint.

Other errors are assigned by appellant, and have been discussed by counsel in their briefs of this cause, but as the conclusion we have reached, in relation to the insufficiency of the paragraphs of cross complaint, will require a reversal of the judgment, and, perhaps, a change of the issues in the cause, we need not now consider such other errors. They are not likely to occur again upon a new trial of the cause.

The judgment is reversed with costs, and the cause is remanded with instructions to sustain the demurrers to the second and fourth paragraphs of cross complaint, and for further proceedings.

Filed June 12, 1885.

Watkins *et al.* v. Winings.

No. 11,897.

WATKINS ET AL. v. WININGS.

TITLE TO REAL ESTATE.—*Evidence.*—*Color of Title.*—A party in possession has a right to give in evidence a sheriff's deed although the decree on which it is founded may not be valid, for a void deed may give color of title.

TAXES.—*Void Sale.*—*Transfer of Lien.*—A purchaser at a tax sale may acquire a lien although the sale is void.

SAME.—*Subrogation.*—Where a sale made on a decree foreclosing a lien for taxes is void, the purchaser at such sale will be subrogated to the rights of the lien-holders.

QUIETING TITLE.—*Effect of Decree.*—*Evidence.*—A decree quieting title cuts off all liens not protected by proper provisions in the decree, and in order to prevent this result a defendant in a suit to quiet title has a right to prove the character of a lien held by him.

From the Henry Circuit Court.

J. Brown and W. A. Brown, for appellants.

ELLIOTT, J.—This is an action to recover possession of land and to quiet title, instituted by the appellee. The facts are substantially these: In 1867 the firm of Forkner & Winings, composed of Micajah Forkner and Samuel Winings, became the owners of the lot in controversy; in 1871 Robert and Franklin Newcom obtained judgment against Micajah Forkner on a note executed by him, for one hundred and sixty-five dollars; on this judgment Forkner's interest was sold on the 28th day of May, 1881, and bought by the appellee, and in September, 1882, she obtained a quitclaim deed from the heirs of Joseph Winings, deceased; Joseph Winings obtained title to the lot from Samuel Winings in 1874; taxes accumulated upon the lot, and on the 10th day of February, 1875, it was sold to Wilson Winings, who received a deed from the auditor in February, 1877. The appellants are the heirs of John J. Watkins, who purchased at a sale made upon a decree obtained by Wilson Winings decreeing a lien in his favor for taxes paid by him.

The appellants offered in evidence the papers and record in

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a suit brought by Wilson Winings against Benjamin F. Wisehart, and offered also the deed executed by the sheriff upon the decree. We have not been favored with any brief from the appellee, and our unaided investigation has not enabled us to find any ground upon which this ruling can be sustained.

The appellants had a right to show the title by which they were in possession. The right to show title is one thing, and the effect of the title shown quite another. Color of title may arise from a void deed, yet it will protect the party in possession under it from being treated as a mere trespasser. The appellants ought to have been permitted to give their deed from the sheriff in evidence, and, as showing its foundation, the record of the suit in which was rendered the decree upon which the sale was made. It is true that the judgment did not bind the appellee, for neither she nor her grantors were parties to the action; but, while this is true, it is also true that the sheriff's deed gave color of title and conferred the right to prove the foundation upon which it rested. But there is still another, and, perhaps, stronger reason why the evidence should have been admitted. The sale for taxes, although void, conferred color of title and gave Wilson Winings a lien, for it is well settled that the lien remains although the sale is absolutely void. *Rowe v. Peabody*, ante, p. 198. The lien for taxes existed against the land, and, although the sale on the decree rendered against Wisehart was ineffectual to convey title, yet Watkins obtained the lien of the execution plaintiff, Wilson Winings. It is a just principle, and a familiar one, that a purchaser at an invalid sheriff's sale will be subrogated to the rights of the execution plaintiff, and will succeed to the lien which the decree attempted to enforce. *Bodkin v. Merit*, ante, p. 293; *Short v. Sears*, 93 Ind. 505; *Hines v. Dresher*, 93 Ind. 551; *Carver v. Howard*, 92 Ind. 173; *Jones v. French*, 92 Ind. 138, and authorities cited.

It would be unjust to permit the appellee to secure immunity for her land upon the ground assumed in the ruling of

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the trial court, for her land is liable for the taxes, and ought to pay them, and they ought to be paid to the purchaser who bought at the sheriff's sale, believing he was getting a good title. If her decree quieting title is good it cuts off the lien, for a decree quieting title destroys all liens and claims not protected by proper provisions, and this is a result the appellants had a right to prevent by showing the nature of their title and interest in the land.

Judgment reversed.

Filed June 17, 1885.

No. 11,471.

LA ROSE ET AL. v. THE LOGANSPORT NATIONAL BANK
ET AL.

PRINCIPAL AND SURETY.—*Contract of Surety.*—The engagement of a surety is a direct original agreement with the obligee that in the event his principal fails, he will perform the original obligation; and whether it is entered into jointly with the principal or separately, the extent and character of the obligation are the same as to both, depending only upon the form in which it is expressed.

SAME.—*Contract of Guarantor.*—The contract of obligors, whether entered into separately or jointly with the principal, if by its terms it appears that the principal is separately bound by an original, independent contract, to which the contract for security is collateral, and the obligors agree therein that the principal will pay or perform according to his original engagement, and that they will answer for his default in the event of failure, is a contract of guaranty.

SAME.—*Bond of Bank Cashier is Contract of Guaranty.*—The contract of the sureties in the bond of a bank cashier, conditioned for the faithful discharge of his duties by such cashier, is a contract of guaranty. ELLIOTT, J., and ZOLLARS, J., dissent from this proposition.

SAME.—*Notice of Default.*—*Matter of Defence.*—A failure to give notice to guarantors of the default of their principal, except in cases governed by commercial rules, is a matter of defence, and resulting damages must concur with such failure in order to work a discharge.

SAME.—*Complaint.*—*Failure to Aver Notice of Default.*—A complaint upon a contract of continuing guaranty is not subject to demurrer because of its failure to aver notice of the default.

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SAME.—Liability of Cashier.—Access to Funds by Others.—Where by a by-law of a bank its cashier is made responsible for the funds and valuables of the bank, it can not be implied that his bond would not become operative until all the other officers and employees were denied access to such funds and valuables, nor that he is responsible for losses which may occur through the delinquencies of others.

SAME.—Consideration.—Approval of Bond after Appointment.—The bond of a bank cashier, executed and approved two weeks after he enters upon his duties, is upon sufficient consideration, and is operative, at least from the date of its approval.

SAME.—Knowledge by Employer of Misconduct of Employee.—Release of Guarantor.—The knowledge by an employer of the misconduct of an employee, whose conduct and fidelity have been guaranteed by another, which will, if concealed, release the guarantor, must relate to the service in which the employee is engaged, and must be something more than mere moral delinquency, unconnected with the subject-matter of the guaranty.

SAME.—Revocation of Guaranty.—A continuing contract, guaranteeing the fidelity of a bank cashier, may be revoked by the guarantors without cause, upon proper notice, but the right must be exercised reasonably.

PRINCIPAL AND AGENT.—Declarations of Agent.—Only declarations of an agent while actually engaged in transacting the business of the principal, to which the declarations relate, are admissible.

PRACTICE.—Bills of Exceptions.—Bills of exceptions must be signed by the judge and filed within the time limited.

From the White Circuit Court.

S. T. McConnell, R. Magee, D. B. McConnell and D. Turpie, for appellants.

M. Winfield, C. E. Taber, D. D. Dykeman, W. T. Wilson, G. C. Taber, A. W. Reynolds and E. B. Sellers, for appellees.

MITCHELL, C. J.—Oscar M. Goodwin was appointed cashier of the Logansport National Bank on the 9th day of January, 1878.

In compliance with a requirement of its by-laws, he executed his bond, with the appellants as sureties, in the penal sum of \$25,000, conditioned for the faithful discharge of his duties as cashier.

This suit was brought by the bank against Goodwin and his sureties on the bond.

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The complaint is in six paragraphs, to each of which a demurrer was filed and overruled. Each paragraph avers the appointment of Goodwin on the date above mentioned, the execution and approval of the bond on the 23d day of January, 1878, that he entered upon, and continued in, the discharge of his duties as cashier until June 17th, 1882, when he wrongfully destroyed the bond and absconded, largely in default to the bank.

With each paragraph of the complaint is set out what purports to be a substantial copy of the bond, which is, in substance, as follows :

Know all men that we, etc., are held and firmly bound unto the Logansport National Bank, etc., in the penal sum of twenty-five thousand dollars, for the payment of which we bind ourselves, etc.

But, whereas the above named Oscar M. Goodwin was on the 9th day of January, A. D. 1878, duly appointed cashier of the above named bank by the board of directors of said bank, to hold said office during the pleasure of said board, etc. : Now, therefore, if the above named cashier shall faithfully discharge the duties of said office during his continuance therein, and such duties as are now or may hereafter be from time to time prescribed by the by-laws of the board of directors, etc., and shall safely keep account for and pay over all moneys, etc., belonging to said bank, and deliver all notes, bonds, bills, obligations, books, papers and other property of said bank which shall come into or be in his possession by virtue of his office, to the board of directors, then this bond shall be void, otherwise, etc.

A by-law of the corporation is also set out, which provides that the cashier shall be responsible for the moneys, funds and valuables of the bank, and requires that he give bond for the faithful discharge of his duties.

- The breaches assigned in varying detail in each paragraph are, that Goodwin embezzled, appropriated and converted to his own use large sums of money belonging to the bank ; that

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he failed to discharge his duties as cashier, by making false entries on the books of the bank in order to deceive its board of directors ; and that he also failed to discharge his duty in other respects, with reasonable skill and diligence, by means of which a large sum of money was lost to the bank, which, upon demand, he failed to account for and pay over.

We concur in the statement found on page 3 of appellants' counsel's printed brief, in which it is said, "These paragraphs of complaint are all substantially the same."

The case was argued orally, with great ability and learning, and elaborate briefs were filed by counsel on both sides.

On the one hand, it was argued that the undertaking of Goodwin's bondsmen constitutes a continuing guaranty, and is collateral to the original contract, and that, as there is in the complaint no averment of notice of the default before suit brought, the demurrer thereto should have been sustained.

As against this view, it is contended that as the contract was entered into jointly with the principal obligor, it is an original undertaking, and that the bondsmen became liable as sureties, and as such were not entitled to notice.

With respect to the distinction between a guarantor and surety, much nicety of refinement and some uncertainty will be found to exist, and the basis on which the distinction is made to rest is not always satisfactory. We think it may be said, however, that where the engagement is that one who is liable in the first instance will pay a debt or perform an obligation, and that, upon his default, the promisor will answer for such default, the contract is one of guaranty. A concise definition of the term is: "A promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of some person who, in the first instance, is liable for such payment or performance." Baylies Sureties and Guar. 2 ; 3 Kent Com. 121 ; *Gallagher v. Nichols*, 60 N. Y. 438 ; *Dole v. Young*, 24 Pick. 250 ; *Colebrooke Col. Secur.*, p. 329.

The engagement of a surety is, that in the event his prin-

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cial fails, he will perform the original obligation, and whether it is entered into jointly with the principal or separately, the extent and character of the obligation are the same as to both, depending only upon the form in which it is expressed. The contract of a guarantor, on the other hand, is that the principal is able, willing, and that he will perform an engagement which he has undertaken or is about to undertake, and that in the event of failure the guarantor will answer for the consequences. Whether the contract is entered into separately or jointly with the principal, if by its terms it appears that the principal is separately bound by an original independent contract, to which the contract for security is collateral, and the obligors agree therein that the principal will pay or perform according to his original engagement, and that they will answer for his default in the event of failure, they become guarantors. The contract of the one is a direct original agreement with the obligee that the very thing contracted for shall be done. The other enters into a cumulative collateral engagement, by which he agrees that his principal is able to and will perform a contract which he has made, or is about to make, and that if he fails he will, upon being notified thereof, pay the resulting damages. *Ward v. Wilson*, 100 Ind. 52 (50 Am. R. 763); *Reigart v. White*, 52 Pa. St. 438; *Woods v. Sherman*, 71 Pa. St. 100.

In Murfree on Official Bonds, section 1, it is said: "If, however, a bond be executed by a stranger to the original debt, it is regarded as a guarantee." Goodwin's contract with the bank was that he would devote himself, in skill, experience and fidelity, to the conduct of its affairs as cashier. This was his personal obligation to the bank, which no one could discharge in his stead. His bondsmen engaged, that he was possessed of the requisite qualifications to that end, and that he would faithfully exert them in its behalf. In no event was it contemplated that they or either of them would discharge the duties of cashier, or do the particular things which he might fail to do. The fair import of their contract

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is that they will pay any damages which may accrue on account of his default. This constituted them guarantors, and that Goodwin also joined in this collateral contract did not make it different.

The bond was not the original or principal contract, but was collateral, or in addition to, or by the side of the engagement of Goodwin with the bank, and being so collateral it is brought within the very terms of a guaranty.

Goodwin remained liable on his original engagement with the bank in the same manner and to the same extent that he was before. That he joined in the bond neither enlarged nor varied his original obligation, nor did it in any way bring his sureties into privity with his original contract, nor in any way make that of his bondsmen different from what it would have been if he had not joined.

That the bondsmen, between themselves and their principal, stood in the relation of sureties, may be conceded, but this is aside from the question before us; that is, what was the nature of their contract with the bank? If it was an original undertaking, they are sureties; if collateral to the original, guarantors. Their contract with the bank must be determined by its substance and terms, and not by the fact that it was joined in by the principal.

The question before us was determined in *Singer Mfg. Co. v. Littler*, 56 Iowa, 601. In that case Littler, as principal, and the other defendants as sureties, executed a bond conditioned that Littler, as agent of the Singer Manufacturing Company, should pay all indebtedness which had or might accrue in favor of the company against him. A suit was brought on the bond, and it was there, as here, made a question whether the bondsmen were liable as sureties or guarantors. It was held, upon careful consideration of the question, that the bondsmen were guarantors. They were there aptly denominated sureties on a contract of guaranty. So, in the case of *Gage v. Lewis*, 68 Ill. 604, in which a bond given

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by the continuing members of a firm of partners to a retiring partner, conditioned that the continuing members would pay all the partnership debts. In a suit upon the bond, the rights of the surety were determined upon the basis that his contract was one of guaranty. Again, in the case of *Locke v. McVean*, 33 Mich. 473, McVean had been appointed, under a written contract, the agent of Locke, to sell sewing machines. He also gave bond, with two sureties, conditioned that he would "well and truly keep and perform in all respects, according to its true intent and meaning," his contract. The sureties were regarded, and their liability determined, on the basis of guarantors. See, also, *Farmers, etc., Bank v. Kercheval*, 2 Mich. 505.

It is contended that the contract under consideration is one of suretyship, within the holding in *McMillan v. Bull's Head Bank*, 32 Ind. 11 (2 Am. R. 323). The case referred to contains a clear and valuable exposition of the distinction between a contract of guaranty and one of suretyship, and within the distinctions there made we think no doubt can remain but that the contract here is one of guaranty. It is true it is there said "a guarantor can not be sued with his principal; for his engagement is not jointly with the latter," but this means that he can not be sued with him on his original contract, because his engagement with him on that contract is not joint. In the nature of things a contract which is in fact collateral to an original engagement, and which is in form and essence a contract of guaranty, so far as the guarantors are concerned can not be turned into an original undertaking or a contract of suretyship, by reason of the fact that the principal has also signed it.

It may be well to state that official and statutory bonds are, or may be, governed by statutory and other rules not applicable to common law obligations, and so with guarantors of promissory notes in which rules of commercial law are involved.

As respects collateral common law obligations, which are

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in their nature contracts of guaranty, we think the conclusion reached is in consonance with sound reason and justice, and well supported by authority. To hold the obligors on a bond of the character here in question liable as sureties, and bound to take notice of the default of the principal, would expose them to a continuing liability, of which they might remain in actual ignorance for years after it had occurred, and until the defaulting principal had become insolvent, or their opportunity for indemnity was hopelessly lost. While to give the contract its natural effect, and hold them guarantors, would require the obligee to give notice of the default, or take the chance of loss upon himself.

By construction of law the authorities agree that a guarantor is entitled to notice of the default of his principal, but whether a failure to give such notice effects a discharge of the guarantor is a question upon which the courts are not all agreed. If the guarantee fails to give notice, and thereby damage ensues to the guarantor, it is held everywhere that to the extent of such loss the guarantor is discharged.

Upon consideration of this question, it was held in the case of *Ward v. Wilson, supra*, following what seemed to be the better reason, and the current and weight of the adjudications of this and other courts, that a failure to give notice, except in cases governed by commercial rules, was a matter of defence, and with such failure resulting damages must concur in order to work a discharge of the guarantor. The case of *Singer Mnfg. Co. v. Littler, supra*, relied on by counsel for appellant, shows, in the facts found, that loss was sustained, and is, therefore, not in reality opposed to our conclusion on this point. Concurring with appellants' counsel in the view, that the contract of the appellants was one of continuing guaranty in which the guarantors were entitled to notice, our conclusion nevertheless is that the complaint was not subject to demurrer because of its failure to aver notice of the default.

It is claimed that the complaint is insufficient, on the fur-

ther ground, that it appears from a by-law of the bank, which is set out in each paragraph, that the cashier was to be held responsible for the moneys, funds and valuables of the bank, and inasmuch as the bond was given to cover his liability, it is argued that in order to hold the complaint good it must appear that Goodwin was put in the exclusive custody and control of its moneys, funds, etc.

As already stated, it is averred in the complaint that Goodwin was appointed and entered upon his duties as cashier. It must be implied from this averment, that to the extent that his duties required him to be placed in possession and control of the funds and valuables of the bank, such possession was given. That other officers and employees may have exercised duties and functions which at the same time gave them access to, and to some extent control over its funds, could in no way impair or affect the possession and control which were necessary to the proper discharge of Goodwin's duties as cashier. It could not have been implied from the fact that the cashier was made responsible for the moneys and funds of the bank that his bond would not become operative until all the other officers and employees were denied access to such funds. It was only meant that as cashier he should be responsible that the funds and valuables should be properly accounted for according to the duties which he owed as cashier. We can not know judicially what officers and employees are required for the proper conduct of the business of a bank, nor can we define in detail their several functions and duties. These may vary according to the location and business of the bank. It is, however, a matter of such common observation that courts can not be ignorant of the fact that in the administration of the daily affairs of a bank some one besides a cashier must have access to its funds. It by no means follows that the cashier is not so far in possession as to be rightfully held responsible to account for the funds of the bank to the extent, perhaps, of exhibiting each day, or whenever properly called upon at least, the

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exact condition of its affairs. Nor does it follow that he is responsible for losses which may occur through the delinquencies of others. *Detroit Savings Bank v. Ziegler*, 49 Mich. 157 (43 Am. R. 456); *Rochester City Bank v. Elwood*, 21 N. Y. 88; *German Am. Bank v. Auth*, 87 Pa. St. 419 (30 Am. R. 374).

It is further contended, that as the complaint avers that Goodwin was appointed cashier on the 9th day of January, 1878, and the bond was not approved until the 23d day of January, 1878, the bond was in consequence executed without consideration.

We do not agree with this view of the case. It is averred in the complaint that a by-law of the bank, which is set out, required the cashier to execute a bond in a stipulated amount, and that in pursuance thereof the bond in suit was executed. Whether the cashier entered upon his duties before or after the bond was approved, does not clearly appear. Nor is it material. It does appear that a bond was required, and that in pursuance of such requirement, the bond in suit was executed and approved, and that Goodwin entered upon and continued his duties as cashier. It is clearly implied, if it is not averred in terms, that he obtained and continued in office as cashier, by reason of the fact that the bond was to be and was executed. This was a sufficient consideration, and the bond was effectual and operative, at least from the date of its approval.

It was held in *Bank of the U. S. v. Brent*, 2 Cranch C. C. 696, that the bond of the teller of a bank, executed fourteen days after he entered upon his duties, was valid.

The complaint, as originally filed, consisted of three paragraphs. To this the defendants filed, among others, the following answer:

7. "For a seventh and further paragraph of answer herein, the defendants, except Goodwin, admit, and each of them separately admits, that defendants executed the bond sued on, but each of them, except Goodwin, separately avers that long

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before the several embezzlements, frauds and appropriations, mentioned in the plaintiff's complaint, the plaintiff, through her proper officers, was notified by the defendants, and by each of them separately, that the defendant Oscar M. Goodwin was addicted to the vices of whoring, drunkenness and gambling, and demanded that he be relieved from the position of cashier, and the said bond cancelled, which *defendant* (plaintiff) agreed to do."

A several demurrer was filed to the answer, and sustained as to the paragraph above set out, and one of the errors assigned, and insisted upon, is that in this the court erred.

Subsequently, additional fourth, fifth and sixth paragraphs of complaint were filed, to which additional paragraphs of answer were filed. The thirteenth paragraph of answer to the additional paragraphs of complaint contained, substantially, the same averments as the seventh, with the addition that in pursuance of the notice to, and demand upon the officers of the bank, it had released the defendants from the bond. A demurrer was overruled to this paragraph, and it is now claimed that all the evidence was admissible under the thirteenth that would have been under both paragraphs if the seventh had remained in. It is insisted that for the reason mentioned, even if the seventh was a good answer, the error in sustaining a demurrer to it was harmless.

It seems to be conceded that the difference between the several paragraphs of complaint is not material; at all events, no attempt has been made to indicate wherein any essential difference exists. We think the question might with propriety be disposed of by adopting the suggestion that no reversible error was committed, even if the ruling was erroneous, but as the question involved is fully presented on both sides by able counsel, we deem it due to them, and to the learned court in which the ruling was made, that the merits of the answer should be examined.

Under the assignment of error which presents the ruling on this answer, the question of the right of one who guar-

antees the good conduct and fidelity of another to revoke such guaranty is discussed. It is claimed on the one hand that the misconduct of the cashier, notice of which was communicated to the officers of the bank, was such that the guarantors were released from the date of such notice. Incidentally it was argued that guarantors, on a contract such as that here in question, have the right at any time upon notice given to revoke such guaranty, without regard to the conduct of the person in whose behalf it is given.

As against this view it is argued that the misconduct which will authorize guarantors, in like circumstances with those in question, to claim exoneration must relate to some act or acts of dishonesty or incapacity in the office or business to which the employment pertains. It is further contended that a bond can not be released by parol.

That the retention in service of one whose conduct and fidelity are guaranteed by another, after knowledge by the employer of his dishonesty, or defalcation, or other misconduct, which renders him unfit for the place, without disclosing the fact to the guarantor, is such a fraud upon the latter as will discharge him from all subsequent liability, is well settled. *Phillips v. Foxall*, L. R. 7 Q. B. 666; *Burgess v. Eve*, L. R. 13 Eq. 450; *Graves v. Lebanon Nat'l Bank*, 10 Bush, 23; *Brandt Suretyship and Guar.*, section 368.

The misconduct, of which the employer has knowledge, and which will release the guarantor if concealed, must, however, relate to the service in which the person whose conduct is guaranteed is engaged, and must be something more than mere moral delinquency, having no relation to, or connection with, the subject-matter of the guaranty. *Atlas Bank v. Brownell*, 9 R. I. 168 (11 Am. R. 231); *Andrus v. Bealls*, 9 Cowen, 693.

Whether the cashier, whose conduct and efficiency were vouched for, was or was not addicted to the vices imputed to him, at the time the defendants became his guarantors, or whether, if he was, the fact was known to them, is not disclosed

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by the answer. If the immoral conduct imputed to Goodwin was a material element as respects their right to demand a release from the bond, then it was also material that he was, at least so far as they knew, free from these vices at the time they entered into the engagement. Manifestly, if he was then addicted to them, and they knew it, the fact that he continued in their practice would furnish no ground for their release. Besides, to say of one that he is addicted to the vices imputed, is to speak relatively. If it be conceded that moral turpitude and social wrong are involved in the indulgence, to any degree, in the imputed vices, and that being addicted to any extent whatever is an imputation upon the character of the person, such indulgences nevertheless can not be made the basis of any legal right or remedy in the connection in which they are here interposed, until they assume an extent or degree which affects the fitness of the person to whom they are attributed for the service required, or until some at least probable relation is shown between their indulgence and the business in which he is employed.

The answer amounts to nothing more than this, the bondsmen notified the officers of the bank that they were dissatisfied with the moral conduct of Goodwin and demanded that he be discharged and the bond cancelled, and the bank agreed to comply with their demand, but before compliance the defalcation occurred. This is pleaded in bar of the whole complaint. Whether the notice was given a day before the defalcation or a month or a year does not appear. Let it be assumed, as we think it may, that the guarantors had the right, upon reasonable notice to the proper officers and directors of the bank, to revoke their guaranty without regard to any misconduct on the part of their principal, and for no other reason than that they chose to do so, yet they must exercise this right reasonably. No misconduct creating a probable emergency appearing, the bank could not be expected to subject its affairs to probable embarrassment by the immediate discharge of its chief executive officer. While

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we find no adjudged case which holds that guarantors in a continuing contract like this may, upon notice, revoke the guaranty without cause, at their pleasure, we are nevertheless of opinion that in sound reason such right should and does exist, but the right must be exercised reasonably, and upon due and proper notice to all concerned. The right to revoke a contract guaranteeing the good behavior of another, without an express stipulation in the contract reserving such right, has been denied. Brandt Suretyship and Guar., section 113.

As expressing our view on the subject we quote the following from a learned author: "A promise of guaranty is always revocable at the pleasure of the guarantor by sufficient notice, unless it be made to cover some specific transaction which is not yet exhausted, or unless it be founded upon a continuing consideration, the benefit of which the guarantor can not or does not renounce. * * * And if the guaranty be to indemnify for misconduct of an officer or servant, this promise is revocable, provided the circumstances are such, that when it is revoked, the promisee may dismiss the servant without injury to himself on his failure to provide new and adequate sureties." 2 Parsons Con., "Revocation of Guaranty," pp. 29, 30. See, also, Bishop Con., section 682. The rule above stated, we think, is founded in justice and common right, and is in analogy to the statutory rule relative to official and statutory bonds. In any view, however, in which the answer may be regarded, we think it clearly insufficient for the reasons stated.

During the progress of the trial the defendants proposed to introduce in evidence certain conversations had between Amanda M. Goodwin and Mr. Murdock, the president of the bank. The purport of these conversations was that more than a year before the alleged defalcations and absconding of the cashier, the president of the bank admitted in a conversation had with Miss Goodwin that the cashier was conducting himself badly, was drinking to excess, and neglecting his business, and that he, Murdock, was trying to get him to do

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better, and that if the directors of the bank knew of his, the cashier's, habits and conduct in that regard, he feared he would be discharged. A conversation between Mr. Murdock and one Smith of similar purport was offered. The evidence of both witnesses was properly excluded. Conceding that it was competent to prove the fact that the cashier was in the habit of becoming intoxicated, to the neglect of his duties, and that it was competent to prove that the officers of the bank had knowledge of the fact, it was not competent to prove it by introducing in evidence admissions made by an officer or agent of the bank after the fact occurred. Only declarations of an agent while actually engaged in transacting the business of the principal, to which the declarations relate, are admissible. *Hynds v. Hays*, 25 Ind. 31; *Pittsburgh, etc., R. R. Co. v. Theobald*, 51 Ind. 246.

The defendants also offered in evidence a certain book of the bank, which was excluded. As we can not tell what the book would have shown if it had been admitted, there being no statement of the nature of its contents, and no part of it being shown in the record, we must presume the ruling of the court in that regard was correct.

Questions are also made upon the instructions given by the court. No exceptions were saved to these instructions in the manner provided in section 535, R. S. 1881.

The judgment was rendered in the court below on the 6th day of October, 1883, when the court gave the defendants ninety days within which to complete and file bills of exceptions. The time thus given would expire January 4th, 1884. From the bill of exceptions, purporting to contain the instructions given by the court, it appears to have been presented to the judge, and signed by him, on January 1st, 1884, but the record shows it was not filed with the clerk until January 22d, 1884. This was too late. Section 629, R. S. 1881, does not change the rule which requires bills of exceptions, not only to be signed by the judge, but in addition to be filed

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within the time limited. *Louisville, etc., R. W. Co. v. Har- rigan*, 94 Ind. 245; *Ackerly v. Board, etc.*, 89 Ind. 581.

A bill of exceptions, containing nineteen instructions asked by the defendants and refused by the court, is copied into the record. Some question is made by the appellee whether this bill is properly in the record. Whether the instructions are properly in the record or not, we do not determine, as appel- lants' counsel in their briefs present no question upon them. To say, for example, that instruction "No. 5, found on page 182, commencing on line 21, to line 32, we think states the law as to the first paragraph of the complaint, and as no like instruction, nor any one embodying the same propositions of law, or any of them, was given, it should have been given, and to refuse it was error," without anything further, and to repeat that substantially with reference to all the others, is to induce us to conclude that no error was apparent to coun- sel. Within the rule, any claim of error, so far as the re- fusal of the instructions asked is concerned, must be deemed as waived. *Millikan v. State, ex rel.*, 70 Ind. 283.

The record and briefs in the case are exceedingly volumi- nous. We have carefully examined all the questions to which our attention has been called in the argument. Much is said in the printed briefs to the effect that the verdict is not sus- tained by the evidence, and some of it is there set out and commented upon and criticised at length. It would extend this opinion unnecessarily to state in any detail the reasons which lead us to conclude that the evidence sustains the find- ing of the jury.

Upon careful consideration of all that seems material, our opinion is that the finding of the jury ought not to be dis- turbed, and as we find no error of law in the record, the judg- ment is affirmed, with costs.

NIBLACK, J., agrees *pro forma* to the conclusions reached in this case, without intending to commit himself definitely as to the doctrine of that part of the opinion which holds the

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bond sued on to be a contract of guaranty, and not of suretyship.

Filed June 25, 1885.

DISSENTING OPINION.

ELLIOTT, J.—I fully concur in the conclusion reached in the prevailing opinion, but upon one point am compelled to dissent. It is my judgment that the bond upon which the action is founded is a contract of suretyship and not of guaranty. While I have not been able to find any decision expressly affirming that an ordinary cashier's bond is a contract of suretyship, yet I find them generally spoken of as constituting such contracts, and I have not seen an intimation anywhere that notice of default is in any event required, nor have I seen it intimated that there is any doubt at all as to the right to sue all the obligors, the principal as well as the sureties, in one action, although many cases deny that a principal and his guarantor can be jointly sued. Our decisions upon bonds of a like character have uniformly treated those who unite with the principal as sureties, though it is true that, with one exception, the point here discussed does not seem to have been definitely presented. It was, however, presented in one case where it was said: "The bond was joint and several. E. R. Forsyth was not a guarantor but a surety, and by the terms of his obligation he was liable for every indebtedness now existing, or which hereafter may in any manner exist or be incurred on the part of said W. H. Forsyth to said company." *Burns v. Singer Mfg. Co.*, 87 Ind. 541, opin. 544.

The contract sued on, an ordinary cashier's bond, undertakes, upon one and the same consideration, that all of the obligors shall be responsible for the conduct of one of their number. It does not guaranty the payment of an existing indebtedness, nor does it guaranty payment for goods to be sold the principal, but it undertakes that one of the obligors shall faithfully perform the duties of a trust confided to him. It is an agreement that one of the obligors shall do a desig-

nated thing or things; it is not a guaranty that he will do these things, but a positive, direct, and express undertaking that he will do them. The principal joins in the undertaking, and he, surely, can not be justly deemed a guarantor for himself. All the obligors are liable on the contract, and all may be sued. There is no precedent liability, one and all of the obligors become liable on the default of one of the obligors to do what all have agreed and promised he shall do. There is no distinct and different liability. The default that makes one liable makes all liable. Their liability is on the same instrument, accrues at the same instant, and flows from one and the same breach of one and the same contract. A text-writer says: "The words surety and guarantor are often used indiscriminately as synonymous terms; but while a surety and a guarantor have this in common, that they are both bound for another person, yet there are points of difference between them which should be carefully noted. A surety is usually bound with his principal by the same instrument, executed at the same time and on the same consideration. He is an original promisor and debtor from the beginning, and is held ordinarily to know every default of his principal. Usually he will not be protected, either by the mere indulgence of the creditor to the principal or by want of notice of the default of the principal, no matter how much he may be injured thereby. On the other hand, the contract of the guarantor is his own separate undertaking, in which the principal does not join." Brandt Suretyship and Guar., section 1. *Markland M. & M. Co. v. Kimmel*, 87 Ind. 560.

In a carefully written article in the Albany Law Journal it is said: "It may be stated as a general rule that the bond of a cashier or other officer is an undertaking, not only for honesty but for capacity, for reasonable skill and diligence in the discharge of his duties." 17 Alb. L. J. 340. In this article very many cases are collected, and they speak of the bond as a contract of suretyship, as does Judge Thompson in his work on the "Liability of Officers and Agents of Cor-

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porations." See pp. 494-544 inclusive. They are so treated by other writers. Morse Banking, 211, 247; Law of Building Ass'ns, sections 217, 219.

It is true of every contract of suretyship, that the liability of the sureties is accessory to that of the principal. Pothier says: "As the obligation of sureties is, according to our definition, an obligation accessory to that of a principal debtor, it follows that it is of the essence of his obligation, that there should be a valid obligation of a principal debtor." 1 Pothier Obl. 366; De Colyar Guar. & Sur. 37; Burge Suretyship, 3.

In every case of suretyship there is a contract of the principal which the surety undertakes that he shall perform. Of the many familiar instances, it is only necessary to name a few: A receiver's bond, an appeal bond, a bond to secure the performance of a building contract, to secure the faithful performance of duties by the agent of a corporation, to refrain from engaging in a designated business within the limits of a certain specified territory. High Receivers, sections 127 to 133, and cases cited; *Gavisk v. McKeever*, 37 Ind. 484; *Davis v. Sturgis*, 1 Ind. 213; *Potts v. Hartman*, 101 Ind. 359; *City of Lafayette v. James*, 92 Ind. 240 (47 Am. R. 140). In all of these cases, and very many more like them, it has always been considered that the contract of the principal was the main one, and that of the other promisors the accessory; but, nevertheless, that the latter were sureties. If it can be said of the bond of a cashier that those who unite with him are guarantors, and not sureties, then the same thing must be said of bonds of agents, of trustees, of receivers, and, in fact, of all bonds in which all the obligors are not all principals. With all deference and respect, I submit that such a holding would destroy settled rules and narrow the limits and range of contracts of suretyship much within the limits long and uniformly assigned to them. It seems to me that it must be said of the cashier's bond before us, as was said of the bond before the court in *City of Lafayette v. James*, *supra*, that "The bond is simply an undertaking that he should perform the duties of his em-

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ployment as already fixed at the time of, and prior to, the execution of the bond."

So far as the statement of facts in *Singer Mfg. Co. v. Littler*, 56 Iowa, 601, enables me to judge of its effect and scope, I think it not in point. The question there arose on the answer. The complaint averred that Littler became bound to pay money to the plaintiff upon the sale of sewing machines, or upon the endorsement of paper taken upon such sales, and the sureties answered that they had no notice of his default. In that case, therefore, there were debts guaranteed, while here, there is an undertaking that duties shall be performed, just as there is in a receiver's bond, an agent's bond, a trustee's bond, and many other bonds of like character. The court in the Littler case recognized the effect and importance of this distinction, for it said: "They became first and only bound upon the bond, whereby they guaranteed that Littler would pay his indebtedness to plaintiff in whatever form it assumed. A guarantor becomes bound for the performance of a prior or collateral contract upon which the principal is alone indebted; a surety is bound with the principal upon the contract under which the principal's indebtedness arises. This is a familiar doctrine of the law." This statement of the law proves that the bond before us makes the appellants sureties and not guarantors, for it is the breach of that bond that creates the indebtedness against all the obligors. The parties are all bound upon the same instrument, the one default makes them all liable, and until that default occurs not one of them is liable, but, when it does occur, all are liable. In the case cited the obligors, other than the principal, were not bound by the instrument which created the indebtedness of the latter; while here the one instrument binds all of the obligors, and the one breach makes them all liable. In speaking of a bond in many respects similar to the present, the Supreme Court of Vermont said: "But there is no distinction, in this respect, between the principal and the sureties. Alanson Seaver had engaged to

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do certain things; and for not doing them he was liable. The sureties engaged that he should do them, and for his not doing them they became liable. So that the same act, or neglect, that charges the principal, must charge the sureties." *Seaver v. Young*, 16 Vt. 658.

In this instance the question whether the contract was one of guaranty or suretyship does not exert an important influence, but the question is intrinsically one of very great importance, and I have thought it proper to outline the reasons which constrain me to dissent from the proposition that a cashier's bond constitutes a contract of guaranty.

ZOLLARS, J., concurs in the foregoing opinion.

Filed June 25, 1885.

No. 11,791.

THE INDIANAPOLIS AND ST. LOUIS RAILWAY COMPANY v.
JOHNSON.

MASTER AND SERVANT.—*Fellow Servants.*—A master is not answerable to a servant for his injury caused by the negligence of a fellow servant engaged in the same line of employment.

SAME.—*Negligence in Employing or Retaining Servants.*—A master who negligently employs, or wrongfully retains in his employment, incompetent servants, is responsible to a servant injured by the negligence of such incompetent fellow servants.

SAME.—*Pleading.*—*General Averment Controlled by Specific Statements.*—In construing a complaint against a railroad company for injury received by the plaintiff while in the employment of the defendant and engaged in coupling cars, a general introductory statement, that the cars were unfit for the transportation of rails, was held to be controlled by specific statements of facts showing that the injury was caused by the manner in which the cars were loaded with rails.

SAME.—*Negligence of Servants of Corporation.*—Where a complaint against a railroad company for injury to the plaintiff while engaged as the servant of the defendant in coupling cars showed that the injury was the result of negligence in the loading of the cars, and it was alleged that the defendant suffered, permitted and directed the cars to be loaded in an improper manner described;

102	352
134	467
102	352
164	515

102	352
1169	678
1169	685
170	284

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Held, that the complaint showed that the injury was caused by the plaintiff's fellow servants.

From the Vigo Superior Court.

J. T. Dye and W. E. Hendrich, for appellant.

J. H. Blake, J. W. Shelton and W. H. Spencer, for appellee.

ELLIOTT, J.—The first paragraph of the appellee's complaint alleges that he was employed by the appellant as switchman, and that while engaged in coupling cars he was injured without any fault on his part. The cause of the injury is thus stated: "And the plaintiff says that said cars were wholly and totally unfit for the purpose of transporting rails, and that said injury was sustained by him through and in consequence of the negligence and fault of defendant in this, that defendant suffered, permitted and directed said cars to be used for transportation of said rails, when it knew, and had good reason to know, that said cars were totally unfit for that purpose, on account of said rails being so much longer than said cars, and when other cars of sufficient length and proper make could have been procured; and by loading bent or crooked iron on said car, being backed up and allowing the same to project downwards and over the end of said car, whereby the plaintiff's hand was caught and injured, as aforesaid; and that said defendant suffered, permitted and directed said bent and crooked iron rails to be placed on and projecting over the end of said car last named, with the bent or crooked side or end downward, when, if proper care and precaution had been taken, and said crooked rails had been placed on said car with the crooked end up, instead of down, this plaintiff would not have run the same risk in attempting to perform his duty in coupling said cars, and he might not have been injured in any way. But the defendant had good reason to know that the said bent and crooked iron rails so projecting downwards would greatly increase the risk to the person attempting to make a coupling, and would endanger

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the life of any person caught between the end of said rail and any object that it might push against."

The general statement that the cars were unfit for the transportation of iron rails is not of controlling importance, for the specific statement which follows it is the one which governs. A general introductory statement or a general conclusion will always yield to a specific statement of the facts. *Ragsdale v. Mitchell*, 97 Ind. 458; *McMahan v. New-comer*, 82 Ind. 565; *State v. Wenzell*, 77 Ind. 428, *vide* auth. p. 430; *Richardson v. Snider*, 72 Ind. 425 (37 Am. R. 168); *Reynolds v. Copeland*, 71 Ind. 422. Acting upon this rule of pleading, we must hold that the specific statement of the facts controls the general averment.

The paragraph of the complaint under immediate mention does not show that the employer of the appellee negligently supplied unsafe machinery; on the contrary, the facts specifically stated clearly show that the injury of which the appellee complains was caused by the manner in which the cars were loaded. The cause of the injury was not unsafe machinery, but the improper use of safe machinery. It is too well settled to admit of debate, that for the negligence of one fellow servant, engaged in the same line of employment, another servant can not make the master answerable. *Indiana Car Co. v. Parker*, 100 Ind. 181. The rule applies to such cases as this. *Ballou v. Chicago, etc., R. W. Co.*, 54 Wis. 257; S. C., 41 Am. R. 31; *Smith v. Flint, etc., R. W. Co.*, 46 Mich. 258; S. C., 41 Am. R. 161.

It is contended by the appellee that it is not alleged that the cars were loaded by his fellow servants, and, therefore, that the question argued by the appellant is not presented. We think otherwise. The appellee must affirmatively make out his case, and to do this he must state all the facts essential to a cause of action; he can not have facts inferred where there are no grounds for inference, and there are none here. The natural and reasonable inference is that the cars were loaded by the servants of the corporation, and not by its

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chief agents and officers. We are satisfied that the first paragraph of the complaint is bad.

The second paragraph of the complaint is good for the reason that it avers, in addition to other material facts, that the appellant negligently and wrongfully employed and retained incompetent servants with knowledge of their incompetency. It is well settled that a master who negligently employs, or who wrongfully retains in his employment, incompetent servants, is responsible to a servant injured by the negligence of the incompetent fellow servant. A master is bound to use ordinary care in the selection of his agents and servants, and this duty he owes, not only to the public and third persons, but also to his other servants.

The third paragraph of the complaint is subject to the same objections as the first, and must be held bad.

Judgment reversed.

Filed April 28, 1885.

ON PETITION FOR A REHEARING.

MITCHELL, C. J.—It is held in the principal opinion that the complaint was bad, because it appeared therefrom that the injury to the appellee was the result of negligence in loading the cars, and that an inference arose from the facts stated that they were loaded by his fellow servants.

In the argument on petition for a rehearing, it is vigorously contended that no such inference arises. The insistence is that because it is averred in the complaint "that said defendant suffered, permitted and directed said bent and crooked iron rails to be placed on and projecting over the end of said car last named," etc., it may as well be inferred that this was done by the chief agents and officers of the railroad company as by a fellow servant.

The infirmity of counsel's position is that they would determine whether the persons who loaded the cars were fellow servants or not by the office they held, and not by the work in which they were at the time engaged. One who loads the

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cars of a railroad company is, while so engaged, a fellow servant with the brakeman who goes upon the train in which such loaded cars are afterwards placed, and it makes no difference what official designation of agency may be applied to him. There are certain duties which pertain to the position of master, and whoever performs them is, for the time being, in the master's place. There is also certain work which pertains to the duty of employee or servant, and whoever else beside the master does this is, while so engaged, a fellow servant with any other employee who is in the same general employment. Courts know judicially that loading railroad iron on flat-cars pertains to the service of an employee, and when it is averred that one servant was injured in consequence of the negligent manner in which such loading was performed by the defendant, the presumption arises that such injury was the result of the negligence of a fellow servant. This is so because a railroad corporation must of necessity employ servants to load its cars. To say that the servant who loaded the cars was also the chief agent and officer of the railroad company, without more, would in no manner change the situation. Regardless of his agency or office in other respects, if he was also properly engaged in loading cars, he was at that time a fellow servant with all others in like service.

The petition for a rehearing is overruled.

Filed June 26, 1885.

 No. 11,812.

HOLDERMAN v. MILLER.

VENDOR AND PURCHASER.—*Growing Wheat.*—*Reservation.*—*Personal Property.*—Wheat which in fact is attached to and is a part of the soil, although in a theoretical sense separated therefrom by a reservation in the deed of a grantor, is not in a condition to be transferred under a general designation of property on and distinct from the farm.

102	356
137	473
103	856
140	622

102	356
167	591

102	356
171	353

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SAME.—Reformation of Deed.—Where a grantee, believing he is the owner of growing wheat by purchase of the land, buys from his grantor his household goods "and all other property on said farm," he can not, upon discovering that the wheat was reserved but under circumstances not entitling him to a reformation, claim the wheat as a part of the personal property so purchased.

PLEADING.—Theory of Case.—Practice.—A plaintiff must recover upon the theory of the case on which his complaint proceeds or not at all.

From the Elkhart Circuit Court.

J. H. Baker and *J. A. S. Mitchell*, for appellant.

R. M. Johnson, *H. C. Dodge* and *E. G. Herr*, for appellee.

NIBLACK, J.—Complaint by Martha Miller against Abraham Holderman, charging that one Joseph Miller, Sr., was, on the 1st day of September, 1878, the owner of a farm in Elkhart county, consisting of one hundred and twenty acres of land; that on that day the defendant Holderman rented certain fields, constituting a part of such farm, from the said Joseph Miller for the purpose of sowing the same in wheat, upon the terms that the said Holderman was to have three-fifths of the crop when it was harvested and the said Joseph Miller the remaining two-fifths, to be left on the farm for him in the bushel; that, on the 20th day of November, 1878, the said Holderman having in the meantime sowed said field in wheat, the plaintiff purchased the farm for full value from the aforesaid Joseph Miller, embracing also all the household goods and other personal property situate thereon, and including his interest in the growing wheat sowed as above; that, on the 4th day of December, 1878, the said Joseph Miller executed to the plaintiff a deed of conveyance for such farm, in the body of which the words "wheat on said land reserved" appear to have been inserted; that said words of reservation were inserted in such deed of conveyance without the knowledge or consent of the plaintiff, and was done either fraudulently for the purpose of cheating her, or by the mutual mistake of the parties; that two-fifths of the wheat sown by Holderman, under his contract with the said Joseph

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Miller, amounted to two hundred and fifty bushels, all of which Holderman, on the 1st day of August, 1879, converted to his own use, to the plaintiff's damage in the sum of \$400; that the said Joseph Miller has since died, and no administrator has been appointed upon his estate. Wherefore the plaintiff prayed that the deed executed to her as above might be reformed by causing the words of reservation as to the wheat to be struck out, and that she might have judgment against Holderman for \$400.

There was an answer in denial, and a trial by the court resulted in a special finding of the facts as follows:

"1st. Prior to December 4th, 1878, Joseph Miller, Sr., was the owner of the following described real estate in Elkhart county, State of Indiana, to wit: The east half of the southeast quarter and the east half of west half of the southeast quarter of section 25, township 37 north, range 4 east.

"2d. That in the summer of 1878, said Joseph Miller, Sr., rented to the defendant three fields, containing about thirty-two acres of said lands to be sowed in wheat by the defendant, who was to cultivate, harvest and thresh the wheat raised on said land, and retain three-fifths of the wheat so raised and was to deliver to said Joseph Miller two-fifths of the wheat so raised, in the bushel, and that in the fall of 1878, said defendant did sow said fields, so rented, in wheat.

"3d. That on the 1st day of December, 1878, said Joseph Miller, Sr., who was the father of the plaintiff, proposed by parol to sell to plaintiff, and plaintiff to purchase of him, said lands, and what property was then thereon, for the sum of seven thousand dollars, one hundred dollars to be paid down, and plaintiff to execute her notes for \$900, and assume the mortgages and maintenance of her mother, the wife of said Joseph Miller, Sr., as stated in the deed hereinafter set out. The wheat then growing on said land was not mentioned other than as above stated.

"4th. That, on the 2d day of December, 1878, Joseph Miller, Sr., and plaintiff went to the office of George W.

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Best, a notary public at Elkhart, to complete said sale and purchase; that among the other terms and conditions of said sale and purchase, said Joseph Miller, Sr., stated to said notary public that the wheat growing on said lands was to be reserved; that said notary then wrote the deed in the words and figures as follows, to wit: 'This indenture witnesseth that Joseph Miller, Sr., and Catharine Miller, his wife, of Elkhart county, in the State of Indiana, convey and warrant to Martha Miller, of Elkhart county, in the State of Indiana, for the sum of seven thousand dollars, the receipt whereof is hereby acknowledged, the following real estate in Elkhart county, in the State of Indiana, to wit: East one-half of the southeast one-fourth of section twenty-five, township thirty-seven north, of range four east; also, the east one-half of the west one-half of the southeast one-fourth of said section above named, subject to mortgage liens of State of Indiana, Johnson W. Allen, Daniel Miller and George W. Best; also, subject to support and care of Catharine Miller during her life, and payment of her funeral expenses, and the said Martha Miller hereby expressly agrees, in part consideration of this conveyance, with the said Joseph and Catharine Miller to furnish the said necessary support and care for said Catharine Miller and said funeral expenses and to keep said Joseph Miller, Sr., free from the payment of any amount for the support and care of said Catharine Miller, and the said lands shall be held subject to the payment of all amounts necessary to furnish said support and care as aforesaid. Wheat on said land reserved. In witness whereof, the said Joseph Miller, Sr., and Catharine Miller, his wife, have hereunto set their hands and seals this 2d of December, 1878.

"Signed and acknowledged.

"JOSEPH MILLER. [SEAL.]

her
"CATHARINE + MILLER. [SEAL.]
mark

"GEORGE W. BEST.

"E. DUNTON.

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“ ‘*State of Indiana, Elkhart County, ss :*

“ ‘Before me, George W. Best, a notary public in and for said county, this 4th day of December, 1878, personally came Joseph Miller, Sr., and Catharine Miller, his wife, and acknowledged the execution of the annexed deed.

“ ‘Witness my hand and notarial seal.

“ ‘GEORGE W. BEST, Notary Public.’

“That said Best read said deed to said parties, as written, and said Joseph Miller then signed his name to said deed; that said deed was then left in the possession of said Best, who, by arrangement of the parties, took it to the house of said Joseph and Martha, on the 4th day of December, 1878, to be signed by said Catharine and acknowledged by the grantors; that said Best then read said deed again, in the presence and hearing of plaintiff, to said Catharine Miller who then signed it, and together with her husband acknowledged it, when the said deed was placed in an envelope by said Best and laid on the mantel in the room where all the parties were, and with their consent and concurrence. At that time, upon the inquiry by plaintiff, as to whether the deed transferred to her the property on the farm, by direction of said Joseph Miller and plaintiff, said Best drew up and said Joseph Miller, Sr., signed the following written instrument, to wit:

“ ‘Received of Martha Miller \$25 in full payment for all my household goods now in house on farm, and all other property on said farm deeded by me to said Martha Miller.

“ ‘December 4th, 1878. JOSEPH MILLER, SR.’

“That said instrument was read by said Best in the presence and hearing of said parties, and by him placed in said envelope with said deed; that said deed and said written instrument were delivered to plaintiff by placing them on said mantel as aforesaid.

“5th. That at the time of delivering said deed there was no property on said land belonging to said Joseph Miller, Sr.,

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except a few articles of household goods, two old kettles and the wheat in controversy.

"6th. That two days after the delivery of said deed, it having been suggested by a friend that she had better have it examined, plaintiff took said deed and submitted it to Judge Osborne, who read it over to himself and stated to the plaintiff that it was all right; that plaintiff did not state to Osborne the terms of the contract, nor mention the wheat. She then caused said deed to be placed on record.

"7th. That plaintiff took possession of said land upon the delivery of said deed, and that at and prior to the execution of said deed, she was an intelligent woman, possessed of an ordinary common school education, and could write and read writing with ordinary facility; that plaintiff did not read said deed before its execution and delivery to her, nor did she hear the clause in said deed, 'wheat on said land reserved,' read by said Best, nor did she know that said clause was in said deed until in April, 1879; that plaintiff had been acquainted with Best for many years, who was also an attorney, and had drawn one mortgage for her, and advised her on several occasions, and had visited her and her father's family, and was the adviser and attorney of her father, said Joseph Miller, Sr.; that neither the grantors in said deed nor said Best made use of any trick or artifice to prevent plaintiff from reading said deed; that she failed to read it by reason of the confidence she placed in said Best; but she could readily have read it if she had so desired.

"8th. That in April, 1879, an execution issued on a judgment against Joseph Miller, Sr., was levied on said wheat; that said judgment was a lien on said land at the date of the execution of said deed, but said Joseph Miller, Sr., stated to plaintiff, at the time of the execution of said deed, that said judgment was paid, if not, he would pay it; that after said wheat was advertised for sale, as the property of said Joseph Miller, Sr., defendant, without actual knowledge of said res-

ervation in said deed, purchased said wheat from said Joseph Miller, Sr., and paid him therefor \$80, which sum was applied to the payment of said judgment.

"9th. That the wheat so raised on said land amounted to 505 bushels; and the two-fifths amounted to 202 bushels, all of which was taken possession of by defendant in August, 1879, and converted by him to his own use, and on demand made by plaintiff to have two-fifths thereof set apart for her, defendant refused so to do, but retained said wheat, and in the fall of 1880 sold said wheat and retained the proceeds thereof; that said wheat was worth one dollar per bushel, and two-fifths thereof was of the value of \$202, after the taking and prior to the filing of the amended complaint in this cause, to wit, March 2d, 1880; that interest on said sum from said date to the trial, at six per cent., is \$48."

Upon the facts thus found the court came to the following conclusions of law:

First. That the plaintiff was the owner of the wheat in controversy.

Second. That the plaintiff was entitled to recover from the defendant the sum of \$202, the value of such wheat on the 2d day of March, 1880, the time when the amended complaint herein was filed; also, interest at the rate of six per cent. from that date, amounting to \$48, and making in all the sum of \$250.

And, over the defendant's exceptions to the conclusions of law, judgment was rendered against him for the sum of \$250.

Error is assigned upon the conclusions of law stated as above.

The argument here has taken a wide range, and some questions are incidentally, and others elaborately, discussed, which, in our view, are wholly immaterial to a proper decision of the cause. As has been seen, the complaint in this case was framed, and the action prosecuted, upon the theory that certain words, fatal to the plaintiff's right to recover, had been

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improperly inserted in her deed to the farm, and that it was necessary to have a reformation of her deed before her right of recovery would be complete. It is not insisted that the facts, as found by the circuit court, established the plaintiff's claim to have her deed reformed; on the contrary, it is impliedly admitted in argument that, in that respect, the case made by the complaint was not proven at the trial, and the plaintiff's title to the wheat in suit is now made to rest upon a supposed purchase of it by her as personal property on the day the deed to the farm was delivered to her.

Waiving all questions of variance between the claim made by the complaint and the facts found at the trial, we are unable to discover any ground upon which it can be safely held that the plaintiff purchased the wheat from her father, as personal property, after his execution of the deed to the farm.

In the first place, although in a certain theoretical sense separated from the land by the reservation in the deed, the wheat was still in fact attached to, and a part of, the soil, and hence not in a condition to be transferred under the general designation of property on, and distinct from the farm.

In the next place, the inference is irresistible that at the time the plaintiff took her father's receipt for \$25 for the household goods and other property on the farm, she believed she was the owner of the wheat by her purchase of the farm, and that, therefore, she did not either have it in her mind, or in any manner consider, that she was purchasing the wheat, as separate from the farm, when she took the receipt in question; consequently the plaintiff's present claim that she purchased the wheat in connection with, and as a part of, the transaction through which she obtained the household goods, is contrary to the theory upon which the action was prosecuted, and is also in opposition to every fair inference from the facts as found by the circuit court.

The judgment is reversed, with costs, and the cause remanded, with instructions to the circuit court to state conclu-

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sions of law in accordance with this opinion, and to enter judgment thereon in favor of the defendant below.

MITCHELL, C. J., having been of counsel in this cause, took no part in its decision.

Filed June 20, 1885.

No. 11,879.

MAXON ET AL. v. LANE ET AL.

DEED.—*Burdens as Conditions of Grant Running with Land Conveyed.*—A deed from A. to B. for a tract of land contained the following: "Also, convey water to the amount of 600 inches, to be furnished from the head-race of the flouring-mill of said Voisinette (A.); said supply of water to be constant and perpetual. The said grantees (B.) hereby agreeing to assist in keeping up the dam in proportion to the amount of water used by them, and to construct and keep in order their own race."

Held, that the stipulation in the deed, that B. should contribute to the keeping up of the dam, imposed a burden which was a condition of the grant of the water, and runs with the land, and a purchaser from B. of the land and water rights takes them subject to the burden.

SAME.—*Mortgage Subject to Burden.*—C., the purchaser from B., of the land and water rights conveyed to him by A., executed to D. a mortgage upon the same land and water rights, containing the same description and stipulation.

Held, that the mortgage covered the land and water rights, but subject to the same burden.

SAME.—*Rights under Mortgage not Affected by Subsequent Contract to which Holders are not Parties.*—Subsequent to the execution of the mortgage, C., the mortgagor, and L. & L., other grantees of A., entered into a contract which seems to have been entered into as an interpretation of the grant of water and of the burden imposed by the deed from A. to B. The holders of the mortgage were not parties to this contract.

Held, that they are, therefore, not affected nor bound by it.

SAME.—*Pleading.*—*Counter-Claim.*—*Estoppel.*—The mortgage was upon record at the time the contract was entered into. It had been assigned for value to S. and S. who owned the principal part of the stock of the corporation, C., and were the business managers of its affairs. While thus owning and holding the mortgage, they signed its name to the contract. Afterwards and for value they assigned the mortgage to plain-

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tiffs. In the counter-claim by L. & L. there is no averment that S. and S. did anything, said anything, concealed anything, or omitted anything, that did, or might in the least influence or induce the other parties to enter into a contract with C. that they would not otherwise have entered into, nor is there an averment that the other contracting parties were ignorant of the fact that S. and S. owned the mortgage.

Held, that the facts stated in the counter-claim are not sufficient to affect the rights of S. and S. and their assigns, under the mortgage, nor to estop them from asserting those rights.

From the Elkhart Circuit Court.

J. M. Vanfleet, for appellants.

H. D. Wilson and — *Davis*, for appellees.

ZOLLARS, J.—On the 13th day of March, 1873, the Ball & Sage Wagon Company executed a note and mortgage to Sarah Rawling, which latter was recorded on the 10th day of April of that year. On the 15th day of April, Sarah Rawling and her husband duly endorsed the note and mortgage to M. G. and W. Sage, and they endorsed them to appellants. Appellants brought this action to recover judgment upon the note, and a decree foreclosing the mortgage. The Ball & Sage Wagon Company, and Jacob C. Lane and Clark Lane were made defendants. The wagon company made default, and a judgment and decree were rendered against it.

Following a specific description of land, there is this further description in the mortgage of the interest covered by it: "Also, water power to the amount of six hundred inches of water to be furnished from the head-race from the mill of Vincent Voisinette, in manner and condition in deed of said Voisinette to Hiram H. Allen and others."

In the complaint, there are these averments as against the Lanes: "Said Clark Lane and said Jacob C. Lane, as his assignee, hold a certain written contract with said Ball & Sage Wagon Company, executed the 23d day of January, 1874, imposing certain heavy burdens and encumbrances on the real estate described in said mortgage, and now, in order to cut off and foreclose all their rights in and to said real

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estate, given by virtue of said written contract, they are made parties hereto."

After the rendition of the judgment and decree against the wagon company, a sale under the decree, and the purchase of the premises by appellants, they filed a supplemental complaint, setting up these facts, and asking a decree against appellees, that on foreclosure against them they be required to redeem within a year without further sale.

The first question presented here arises upon a counter-claim filed by appellees. The counter-claim is based upon the contract referred to in the complaint between the Ball & Sage Wagon Company and appellee Clark Lane.

Under a "whereas," the contract recites that in July, 1868, Vincent Voisinette executed a deed to H. H. Allen and others, having in it the following: "Also, convey water to the amount of 600 inches, to be furnished from the head-race of the flouring-mill of said Voisinette; said supply of water to be constant and perpetual. The said grantees hereby agreeing to assist in keeping up the dam in proportion to the amount of water used by them, and to construct and keep in order their own race." It is further recited, in an indefinite way, that by purchase and deed, the Ball & Sage Wagon Company had succeeded to the rights and liabilities granted and imposed by the deed from Voisinette to Allen and others; and that Voisinette had conveyed to Clark Lane certain real estate, and all of the water power except thirty-six horse power. Under another "whereas," it is recited that the several parties interested in the water power intended to commence the improvement of the same, and to pay in their due and proper proportion, and be responsible in the same proportion for all costs and damages that might result to others by reason of making the contemplated improvements. Still further, as follows: "And whereas, It is therefore necessary to define, distinctly and definitely, what shall forever hereafter be construed and admitted to be the true intent and meaning of 600 inches of water, as before named in the said conveyance, and to fix

the per cent. or proportion that the said Lane and the said Ball & Sage Wagon Company, respectively, shall pay toward the construction of said improvements, and, also, that they, for themselves, their heirs and assigns, agree shall forever after be binding upon them."

It is then agreed that the water shall be passed to the Ball & Sage Wagon Company through an aperture ten by sixty inches; that Lane and the wagon company shall build a dam across the river at a point near the old one; build embankments, fix the channel, etc. Toward the expense of building the dam, etc., the Ball & Sage Wagon Company binds itself and assigns to pay the one-tenth of the cost of the dam, the one-tenth of keeping it in perpetual good order and repair, and one-tenth of the damages that may result to others by the overflow of lands. After a stipulation that Farvard & Little, who seem to have some interest, shall pay one-sixteenth of said amounts, it is agreed that Lane shall pay the balance, etc.

It is averred in the counter-claim that Jacob C. Lane had become the owner of the dam and all the lands and water power, subject to the exceptions as set forth in the contract, and that he had become the owner of the contract, and bound by its provisions, and that it created a perpetual lien upon, and a covenant running with the land covered by the mortgage. It is further averred that the deed from Voisinette to Allen and others, dated July, 1868, the conveyance to the Ball & Sage Wagon Company, and the deed to Lane from Voisinette, as set forth in the contract, were all properly recorded, and the contents, terms and covenants known to Sarah Rawling at, and prior to, the execution of the mortgage, and to her assigns, Sage and Sage, and to the plaintiffs. It is further averred that Sage and Sage, "while the principal owners and business managers of said corporation, to wit, the Ball & Sage Wagon Company, purchased said mortgage and note, and that while being such business managers, and while so owning such note and mortgage, they, for said com-

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pany, executed the contract hereinbefore set forth;" that the dam and the water power afforded by means of it are of the value of \$40,000, and that the expense of keeping up the dam is, and will be, \$10,000 per year. It is further averred that appellants well knew all of the foregoing facts at the time, and long before they purchased the mortgage, and purchased it for the purpose and with the intent to destroy appellee's rights and interests.

It is alleged still further, that an irreparable injury will result to appellee Jacob C. Lane if his rights under the contract are destroyed by the foreclosure of the mortgage. Prayer that the foreclosure be subject to his rights under that contract.

The counter-claim is, evidently, not the result of the pleader's best efforts, as it and the contract upon which it is based leave in uncertainty and to conjecture what ought to have been made plain. It is inferable, that the deed from Voisinette to Allen and others, granting the water, also conveyed the land covered by the mortgage, and that the land is near to the head-race from which the water was granted, and yet not abutting upon it. It is also inferable that the Ball & Sage Wagon Company received a deed from Allen and others, conveying to it what they had received from Voisinette; that Clark Lane, by grant from Voisinette, had become the owner of the main water power, and the head-race from which the water to the wagon company was to be furnished, and that Jacob C. Lane, by deed from Clark Lane, had become the owner of the water power and head-race. For the purposes of this opinion, we treat these inferences as facts, but do not intend to establish as a rule that inferences can take the place of facts in pleading. But, thus treating the counter-claim, it is yet fatally defective. The stipulation that the grantees in the deed from Voisinette to Allen and others should contribute to the keeping up of the dam, imposed a burden which was a condition of the grant of the water, and runs with the land. A purchaser of the land and

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water rights under that deed takes them with the burden. This was evidently the intention of the parties, and is the reasonable construction of the terms of the deed. *Conduitt v. Ross*, ante, p. 166. The land and the water rights, with the burden imposed, seem to have passed to the Ball & Sage Wagon Company, and the same are covered by the mortgage to Sarah Rawling, which is the mortgage in suit. What was meant by six hundred inches of water is not defined in the deeds nor mortgage, nor is the amount to be paid by the grantees in keeping up the dam stated, except that it shall be in proportion to the water granted. But whatever water was thus conveyed, and whatever the burden imposed may be, they are covered by the mortgage. Appellants, as the owners and holders of the mortgage, have the right to hold, and take in under it, all that it covers, unless by some subsequent contract or some other act or omission, they are estopped to assert that right. Neither Sarah Rawling, M. G. and N. Sage, nor appellants have executed such a contract. The contract of 1874 was executed by Lane and the Ball & Sage Wagon Company. That contract, of itself, therefore, can not affect the rights of the mortgagee or his assigns. It seems to have been made, in some sense, as an interpretation of the grant of water and the burden imposed by the Voisinette deed, but the mortgagee and holders of the mortgage are not bound by such interpretation unless they are in some way estopped to controvert it. In the absence of such estoppel, they have a right to be heard as to what the grant and burden are, and are not bound by the interpretation made by others in their absence. Whether or not the contract of 1874 would add to or lighten the burden imposed by the Voisinette deed, we need not now undertake to decide. It is enough that neither appellants nor their assigns were parties to it. Is there then anything averred in the counterclaim sufficient to constitute an estoppel as against appellants? It is not entirely clear that there was an attempt to

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assert anything in the way of such an estoppel. It is averred that the deeds were upon record, and were notice to Sarah Rawling, M. G. and N. Sage, and appellants. From these, of course, they had notice of the grant of water and the burden imposed. This notice would estop them to deny the burden imposed by the deeds, but nothing more. These deeds of record would not be notice of any subsequent contract, nor of any interpretation of the original grant and burden.

It is further averred that Sage and Sage, while the principal owners and business managers of the Ball & Sage Wagon Company, a corporation, purchased the note and mortgage, and that while such owners and business managers, and while the owners of the note and mortgage, they, for the Ball & Sage Wagon Company, executed the contract of 1874. Just how Sage and Sage were the principal owners is not stated. We presume that the intention was to allege that they owned the principal part of the stock. Let this be granted, and still there is nothing here to work an estoppel against Sage and Sage. The mortgage was upon record, and for aught that appears the Lanes had notice of its contents. And for aught that appears they knew that Sage and Sage were the owners and in possession of the mortgage at the time the contract was made with the wagon company in 1874.

It is plain that Sage and Sage are not the wagon company. The latter is a corporation; the former seem to have been partners. That they may have owned a majority of the stock in the corporation, and were its business managers, does not make them and the corporation one, nor bind one by the contracts of the other. We know of no reason why Sage and Sage might not own the mortgage the same as any other person, nor why, in the absence of fraud or unfair dealing, they should not be protected against any contracts that the wagon company might make, which might affect the mortgage security. And the fact that they knew that the wagon company was making such a contract, if that of 1874 were such, and the fact that they acted for the company in consummating the con-

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tract would not, alone, destroy or affect the mortgage in their hands.

As we have said, for aught that is averred in the counter-claim, the Lanes had actual knowledge of the contents of the mortgage, and knew that Sage and Sage owned it when the contract of 1874 was made. If so, they did not contract in ignorance, but with their eyes open, and voluntarily took the risk of the consequences, if any serious consequences are to follow. There is no averment that Sage and Sage concealed, or tried to conceal, or that they could have concealed, the contents of the mortgage or their ownership of it. There is no averment that they agreed to cancel their mortgage, modify its terms, or hold it subject to the terms of the new contract, if that contract imposed new conditions, nor that they said anything, or did anything, from which the Lanes might infer such an agreement. There is no averment that they said anything, did anything, concealed anything, or omitted anything that did, or might in the least, influence or induce the Lanes to enter into a contract with the wagon company that they would not have entered into but for the wrong of Sage and Sage. There is no averment that the Lanes were induced to part with their money upon the faith of anything that Sage and Sage did or said, or omitted to do or say, nor that they did part with or expend any money.

All these, and every other element of an estoppel, are wanting in the averments in the counter-claim. It may be that such averments may be made, and such proof adduced, as will estop Sage and Sage, and the appellants as their assignees, and bind them by the contract of 1874.

It would not be proper for us to indicate more than we have as to what averments might be sufficient. It is sufficient here to hold that the necessary averments are not in the counter-claim. Upon the doctrine of estoppel, see *Terre Haute, etc., R. R. Co. v. Norman*, 22 Ind. 63; *Snyder v. Studebaker*, 19 Ind. 462; *Ray v. McMurtry*, 20 Ind. 307; *Lash v. Rendell*,

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72 Ind. 475. There are many other cases in the reports in accord with these.

The counter-claim being insufficient, the judgment must be reversed. This conclusion renders it unnecessary for us to examine other questions discussed by counsel.

Judgment reversed, with costs.

Filed June 24, 1885.

 No. 9912.

LEEDS v. THE CITY OF RICHMOND.

MUNICIPAL CORPORATION.—Incidental Powers.—Sewers.—Contract.—The authority to construct sewers needed for the drainage of streets is an incidental power of a municipal corporation invested with the general power over highways within the corporate limits, and the corporate officers have authority to contract for a right to construct a sewer through private property.

SAME.—Public Improvements.—Discretion of Corporate Officers.—It is for the corporate officers, and not for the court, to determine when a public improvement is necessary, and what its general plan and character shall be.

SAME.—Eminent Domain.—Contract.—Statute.—The right to seize private property by virtue of the eminent domain must be conferred upon municipal corporations by statute; but the right to acquire property for corporate purposes by contract need not be expressly conferred by statute, and the delegation of the right to seize property under the eminent domain does not necessarily exclude the right to acquire property by contract.

SAME.—Liability of Corporation for Torts and Contracts of Officers.—Sewers.—Municipal corporations are not responsible for the torts of its officers, nor for breach of contract, when the acts of the officers are beyond the general powers of the corporation; but they are responsible when the acts of the officers are within the general corporate powers, and the construction of a public sewer is an act within the scope of the general powers of a municipal corporation.

SAME.—Respondent Superior.—Independent Contractor.—Damages.—The general rule is that a municipal corporation is not responsible for the negligence of an independent contractor; but this general rule does not apply where the corporation secures a right of way through private property, and expressly contracts to pay all damages occasioned by the con-

102	372
137	473
102	372
140	622
142	128

102	372
151	59
102	372
153	572

102	372
167	503
167	591

102	372
169	642

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struction of the public work; in such a case the maxim *respondet superior* applies.

SAME.—*Injuries from Negligence not part of Expense of Public Improvement Assessable Against Private Property.*—*Sewers.*—*Assessment.*—Damages arising from injuries occasioned by negligence in the construction of a public sewer by a municipal corporation are not part of the expense of constructing the sewer, and can not be assessed against private property, but must be paid out of the general treasury.

PLEADING.—A pleading must proceed on a definite theory, and a complaint can not be good both as a complaint for a breach of contract and as a complaint to recover for injuries occasioned by a negligent breach of duty.

PARTIES.—*Real Party in Interest.*—*Husband and Wife.*—The owner of the property injured by the negligence of another is the real party in interest and the proper plaintiff; this is so although the owner is a married woman and her husband is the general manager of the property.

From the Wayne Circuit Court.

W. A. Bickle and *T. J. Study*, for appellant.

W. D. Foulke and *J. L. Rupe*, for appellee.

ELLIOTT, J.—The appellant alleges in her complaint that she and her husband were the lessees of real estate in the city of Richmond; that she has expended large sums of money in erecting buildings on the land and in providing them with appliances for the purpose of propagating and cultivating plants and flowers; that the city, having determined to build a sewer along an alley on the northeast side of the appellant's land, and desiring to use for that purpose a part of the land, did enter into an agreement with her and her husband, who has since died; that the object of the agreement was to prevent delays that might be caused by litigation; that the city was fully informed at the time of making the contract of the exposure of the buildings and appliances to injury from blasting. It is also alleged that the city let the work to an insolvent person by the name of Shafer, who gave bond, with approved surety, for the performance of the work; that the persons engaged in constructing the sewer, in a negligent, wanton and reckless manner, tore up water pipes, and by reck-

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less and careless blasting caused great injury to the appellant's property.

It is further alleged that the appellant demanded of the appellee that an arbitrator be appointed, as provided in the agreement, and she selected one, but the appellee refused to take any action whatever, or to pay the damages sustained by the plaintiff, or to perform any part of the contract; that afterwards, and without notice to the appellant, the city released Shafer and his sureties from the bond executed by them to secure the performance of the work. The agreement referred to in the complaint and made part of it reads as follows: "This agreement, made this 19th day of April, 1880, between Noah S. Leeds and Hannah A. Leeds, his wife, of the city of Richmond, parties of the first part, and the said city of Richmond, of the second part, witnesseth, That whereas, the said city desires to construct a certain sewer or outlet for water according to the plans and specifications heretofore made by the city civil engineer of said city, and now on file in said engineer's office, which said sewer or outlet is to pass through certain premises now occupied and leased by the parties of the first part, along the line as shown upon the said plan, and in the construction of said sewer or outlet certain damages will be occasioned to said premises which are now used for green-houses and flower gardens: Now this agreement witnesseth that the said parties of the first part agree that said city may enter upon their premises, construct and maintain across said premises, according to said plans, the said sewer or outlet for water, and said parties of the first part agree to remove a certain green-house now across the line of said proposed sewer or outlet at their own cost and expense, all for and in consideration of the payment hereinafter named to be made therefor; and the said city of Richmond does hereby agree and bind herself to pay the said parties of the first part for the privilege aforesaid and for the removal of said green-house, and all damage in going through said premises, except those hereafter named, the sum of three hundred

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dollars; and do further agree to construct said sewer or outlet so as to do as little damage as possible to said premises; and if some extraordinary damage shall be done, occasioned by the negligent construction of said sewer, or by reason of blasting, then, and in that event, the said city shall further pay to said parties of the first part such reasonable sum as shall be a proper compensation for such damage; and if any damage is claimed by the parties of the first part other than that occasioned by the construction of said work through said premises in an ordinary and careful manner, or shall claim damages for any extraordinary thing that may occur to said premises on account of said work, such as blasting or the like, then such damages shall be determined by arbitrators, one of which shall be selected by the parties of the first part, and one by the said city, which two shall choose a third, and their decision upon the question of such damages shall be final and binding upon all parties. It is also expressly agreed and understood that no right is conveyed or granted to said city by this instrument except such as is plainly indicated herein as necessary to the building, completion and maintaining such sewer or outlet through said grounds; and it is further understood and agreed that all rights and privileges granted to said city hereunder are made upon this express condition, that such rights granted and the construction of said works through said grounds shall not interfere with the supply of water as now enjoyed by said parties of the first part, but such supply must be maintained as it now is; but said city may, before the beginning of the work aforesaid upon the premises occupied by said parties of the first part, move the supply pipe which now conveys the water from the cistern or well on Central avenue west of the line of the proposed work and out of the way of the same, and re-lay said pipe along the ravine west of its present location, so as not to interfere in any wise with any building or structures on said premises, and so that the same shall lead directly to the hydraulic ram as it is now located, and so as to conduct the supply of water from

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the same source as now to said ram ; and that said city, at the same time, may remove the pipe through which the water is now forced from said ram to the tank as now located, so that the same shall conduct the water perfectly as now, but out of the way of said proposed work ; and that if it shall become necessary, said city may take away the board box around the said ram as now located, and build a stone wall around or along the same, but shall not interfere with the working or proper use of the same ; and if, in the relaying of said conducting pipes further west as aforesaid, it shall be necessary, the said city shall furnish in the large tank now used for the purpose a sufficient supply of water for the ordinary purposes of the parties of the first part until said pipes are relaid and in successful operation, all of which work of relaying said pipes and replacing the same, and furnishing a supply of water while the same is being done, shall be at the expense of the city."

The authority to construct sewers is regarded as incident to the general right of a municipal corporation to maintain streets and highways. *Cone v. City of Hartford*, 28 Conn. 363 ; *Fisher v. Harrisburg*, 2 Grant Pa. 291 ; *Stoudinger v. City of Newark*, 28 N. J. Eq. 187.

The act for the incorporation of cities in express terms confers exclusive jurisdiction upon municipal corporations over all highways within their limits, and also confers broad powers respecting drains and sewers. There is, therefore, a general authority vested in cities to construct sewers, and, as there is this general power, there is, involved in it, all subsidiary powers essential to make it effective. If a sewer or drain, necessary for the drainage of public streets, can not be constructed without crossing private property, then the city has, as an implied power, the right to acquire the property by lawful means. If it were otherwise, there might be cases where it would be impossible for the city to obtain an outlet for its drains and sewers. Whether it is or is not necessary to build a sewer or drain across private property, is a question for the

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municipal authorities, for it is well settled that courts can not undertake to determine what improvements are necessary, or upon what particular plan they shall be made. *City of Kokomo v. Mahan*, 100 Ind. 242; *Macy v. City of Indianapolis*, 17 Ind. 267.

The authority of a municipal corporation to hold or acquire property need not be expressly conferred, for, where there is a general power which can not be effectively exercised without the acquisition of property, the right to acquire property is impliedly vested in the public corporation. 2 Dillon Mun. Corp. (3d ed.), section 581; *Hayward v. Davidson*, 41 Ind. 212. If there is no restriction in the charter, property may be acquired in any ordinary method; but if the charter prescribes a particular mode of acquiring property, that mode must be followed. The right to obtain property by extraordinary proceedings must be expressly conferred, but the authority to secure it by the ordinary methods may be implied. The high and extraordinary power of eminent domain may not exist without a special grant of power, but the ordinary power to acquire title by purchase may exist without an express grant in cases where it is necessary to effectuate the principal power granted. *Allen v. Jones*, 47 Ind. 438; 2 Dillon Mun. Corp., sections 574, 575, n.

An act conferring upon a municipal corporation extraordinary powers can not be construed to take from it ordinary corporate powers. An added power can not operate to subtract from existing powers. The act conferring upon cities power to seize property under the right of eminent domain can not be construed to deprive them of the power to acquire property by contract for that purpose. Doubtless, the Legislature might restrict the authority to acquire property to that method, but they have not done so, and, therefore, the power exists. The court, while not expressly deciding that land might be acquired for sewerage purposes in *Allen v. Jones*, *supra*, very clearly indicates that its opinion was that property might be thus acquired, for it was there said: "It

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can not be successfully claimed that the power to condemn lands of private persons is necessarily implied in the grant of power to enforce ordinances to construct sewers. The power may exist and be exercised in the construction of sewers along the streets and alleys of the city, or, when the right can be secured by contract, in the lands of private persons."

The act of March 17th, 1875, confers power to condemn lands for "sewerage purposes," and this is a legislative recognition of the general power to acquire lands for that purpose by purchase. It thus appears that we have both the legislative and judicial judgment that the general power resides in municipal corporations; but the question seems on principle so free from difficulty that without the influence of these authorities we should not hesitate to hold that the general power is possessed by municipal corporations when not denied by statute.

We can see no just reason for compelling a municipal corporation to resort to legal proceedings to secure an interest in land which the owner is willing to cede to it by contract. Nor is there any valid reason for subjecting a property-owner to the expense and annoyance of litigation when he desires to make terms with the party who seeks his property and offers an amicable settlement by mutual agreement. The law favors methods that prevent litigation, and sound public policy requires that contracts which secure all that litigation could accomplish shall be respected and sustained.

We do not doubt that the law is that where a mode of procedure is prescribed by statute it must be pursued; but, while thus far concurring with appellee's counsel, we are far from yielding to the conclusion at which they arrive. The fallacy of their argument is in unduly assuming that a special method of acquiring property is prescribed. This assumption can not be made good. The attempt to sustain it rests upon the theory that, having granted the power to exercise the right of eminent domain, the Legislature excluded the ordinary method of acquiring property by contract. What we have

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already said exposes the infirmity of this assumption, but it may, perhaps, serve to set the matter in a clearer light to add an illustration. The power to build engine-houses, market-houses, and like public edifices, is generally possessed by public corporations, and will it be seriously contended that, because the municipal corporation is permitted and authorized to exercise the right of eminent domain, the right to acquire land by contract is denied? It is clear that the grant to a municipal corporation of the privilege of exercising the right of eminent domain does not exclude the authority to acquire property, for a corporate purpose, by contract.

The position that the contract is *ultra vires*, because a municipal corporation has no authority to construct sewers at the public expense can not be maintained. It is, without doubt, the law that a contract which a public corporation has no authority to make is void, and if it were granted that municipal corporations have no authority to make contracts for lands for sewerage purposes, then the conclusion deduced by the appellee would be a logical one, but there is authority to contract for sewers. We have already shown that such is the opinion of this court and such the legislative declaration; but, independent of these authorities, and reasoning on principle, there can be no just reason for doubting the existence of the power. We know, as a matter of which courts take judicial knowledge, that cities have authority to construct and improve streets, and that streets require drainage, and, as we know this, we must conclude, or else defy all rules of logic, that cities possess the power to construct sewers and drains. To deny this power to them would be to cripple the power to lay out and improve streets so greatly as to render it ineffective, and this would involve a violation of the familiar principle that the grant of a principal power carries with it all such subsidiary powers as are necessary to make it effectual. As municipal corporations possess this general power over drains and sewers, they possess, also, as an incident to that power, the right to employ the ordinary means of exercising

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the power so as to make it effective. *New England F. & M. Ins. Co. v. Robinson*, 25 Ind. 536; *City of Indianapolis v. Indianapolis Gas Light & Coke Co.*, 66 Ind. 396; 1 Dillon Mun. Corp., sections 371, 372.

In the contract set forth in the complaint, the use for which appellee's property was required, and for which it was obtained, is shown to be an outlet for a sewer. If we should hold that a public corporation may not contract for an outlet for a sewer, then we should establish a rule that would often make it impossible to properly drain streets, or promote public health by sewerage, for there are cases where it is essential to obtain outlets through private property. This certainly is so in cases where the natural stream into which the sewer flows lies beyond the corporate limits, and may often be so where it lies within those limits. A city, as is well settled, that constructs a sewer, must provide an outlet. *City of Evansville v. Decker*, 84 Ind. 325 (43 Am. R. 86). But, if the power to acquire property needed for an outlet be denied, then it results that there may be cases in which sewers, however much needed, can not be made without entailing liability upon the corporation, and this is neither just nor reasonable.

It must not be forgotten that the question here is one of power. If the city has no power to construct sewers, then the discussion is at an end; but if it has this power, then it may exercise it in any of the usual methods, because the statute does not prescribe the mode in which it shall be exercised. The power is, as we have shown, a general one, and is, as we have said, recognized by the Legislature and the court; but we may emphasize this point by again referring to the act of March, 1875. That act expressly recognizes the existence of the power to construct sewers; it does, if that be possible, even more, for it proceeds solely upon the theory that the power exists. If there is no such power, the act is fruitless, and the Legislature did a vain thing in enacting it. It would be folly to provide for the condemnation of property for a use to which the corporation had no power to appropriate it.

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There is no reason for supposing that the Legislature did such a vain and empty thing; on the contrary, we are bound, by all the rules of construction, to give effect to their act.

If the city can not contract for lands needed for an outlet to sewers, no one else can. Individuals have no authority in such matters; all authority resides in the municipal officers; they must act, and if they alone can act, then they possess authority to obtain property by the usual method—that of purchase.

A step further, although it may not be necessary, will make the validity of our conclusion more clearly appear. The power to lay assessments upon private property for local improvements is an extraordinary one, existing only by virtue of a clear and express legislative grant. The right to grant such a power was for a long time stoutly contested, and the courts, with much hesitation, sustained the power of the Legislature to make such grants. As there is no legislative grant of power to acquire private property for sewerage purposes at the expense of individuals, it must be that the authority does not exist, or that the property must be acquired and paid for by the corporation; and, as the authority does exist, private property may be acquired by the corporation for sewerage purposes.

We agree with the counsel for the appellee that where the act is beyond the power of the corporation, the city is not liable for the tortious acts of its officers, and certainly not for the tortious acts of contractors. A tort committed by corporate officers in the performance of an act not within the power of the municipal corporation will not create a liability against it, for to such cases the rule of *respondet superior* does not apply. The rule which the authorities maintain is thus stated in *Smith v. City of Rochester*, 76 N. Y. 506: "The doctrine is well settled, that municipal corporations are within the operation of the general rule of law, that the superior or employer must answer civilly for the negligence or want of skill of an agent or servant in the course of their employ-

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ment, by which another is injured. It is essential, however, to establish such a liability that the act complained of must be within the scope of the corporate powers, as provided by charter or other positive enactment of law. If the act done is committed outside of the authority and power of the corporation as conferred by statute, the corporation is not liable, whether its officers directed its performance, or it was done without any express direction or command." This expresses the rule approved by this court, as, indeed, by all the courts that have given the subject careful consideration, and by Judge Dillon, who thus states the rule: "There can be no corporate liability when the act complained of is one in no sense authorized by the charter, or constituent act of the corporation, or some valid legislative enactment applicable to it." 2 Dillon Mun. Corp. (3d ed.), section 969; *Cummins v. City of Seymour*, 79 Ind. 491, see auth. p. 497; S. C., 41 Am. R. 618. It is not essential, however, that the act be specially authorized; it is sufficient if it be within the general scope of the powers conferred upon the municipality. 2 Dillon Mun. Corp. (3d ed.), section 971. We think that the acts which caused the injury to the appellant's property were committed by persons employed by the city while engaged in the performance of a work within the general powers of the city of Richmond.

The appellee invokes the protection of the doctrine, that a municipal corporation is not responsible for the acts of an independent contractor, but it can not be here used as a shield. It is, no doubt, a general rule of wide and beneficial operation, but it can not prevail in cases where there is an express contract, as there is here, to pay the property-owner all damages that he may sustain. It needs no argument to prove that the rule can not operate to the prejudice of the owner of property who conveys the corporation an interest in his property in consideration of the agreement of the corporate officers to protect him against all loss or injury. In such a case the contractor employed by the city can not be justly said to

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be an independent contractor. It would be strange, indeed, if a person, artificial or natural, could secure a right to construct a public work upon the land of another under a contract to protect the owner against loss or injury from the work and the manner of its performance, and yet escape liability on the ground that the work was done by an independent contractor. It would be a reproach to the law if it permitted a municipal corporation to obtain access to private property under an agreement to protect the owner from injury, and still allow it to evade performance of its contract upon the pretext that the work was done by an independent contractor to whom it had been awarded. In such a case the contractor as to the property is the agent or servant of the city, and it is liable for his negligence. *Cummins v. City of Seymour, supra.*

The city could not escape the duty it owed to the appellant even if it were true, as contended, that the expense of constructing the sewer must be borne by the property-owners of the locality. Damages resulting from injuries inflicted by the agents, contractors, or servants of the city, are not a part of the expense of constructing the sewer.

It is true that a contract to indemnify a person against an illegal act is beyond the power of a municipal corporation; but a contract binding a city to cause the performance of work to be done in a proper and lawful manner is not such a contract. It is, indeed, perfectly well settled that a city is liable without an express contract if it causes a public work to be done in an unskilful and negligent manner. *Weis v. City of Madison*, 75 Ind. 241, and auth. cited p. 250; S. C., 39 Am. R. 135.

Counsel give a much wider scope to the doctrine of *ultra vires* than the authorities warrant. A contract is only *ultra vires* when, as Judge Dillon says, it is "wholly outside of the legal powers of the corporation." 2 Dillon Mun. Corp. (3d ed.), section 935. The contract before us is not wholly outside of the legal powers of the city of Richmond, and the city

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can not escape liability on the ground that the contract is *ultra vires*.

We adhere to the rule often declared that a complaint must proceed on a definite theory and be good on that theory. *City of Logansport v. Uhl*, 99 Ind. 531, p. 539 (50 Am. 109); *Sims v. Smith*, 99 Ind. 469, see p. 477 (50 Am. R. 99); *Cottrell v. Aetna L. Ins. Co.*, 97 Ind. 311, p. 313; *Western Union Tel. Co. v. Reed*, 96 Ind. 195; *Western Union Tel. Co. v. Young*, 93 Ind. 118; *Mescall v. Tully*, 91 Ind. 96, and auth. cited.

But we are satisfied that the complaint before us does not violate this rule of pleading. We regard it as setting forth the contract for the purpose of showing that the matter was one in which the city had power to act, and as showing, also, an agreement, in consideration of the cession of the interest in appellee's land, to protect her against all loss from the negligent or tortious acts of the persons employed by the city to construct the work, but that the real grievance is the tort committed in doing the work in a negligent and tortious manner.

The complaint avers that the injuries suffered were done to the property of Hannah Leeds, the plaintiff, and she, therefore, was the proper plaintiff. The fact that her husband joined with her in executing the contract does not make him a necessary party, for he is not the real party in interest. The party who owns the property injured by the negligence of another is the one who should bring the action. It is true that the complaint avers that her husband had an interest in the property as a manager for their joint benefit, but, taking all the allegations of the complaint together, it must be held that the husband was simply the agent and the wife the owner of the property injured.

The husband and wife were, as the complaint avers, the lessees of the real estate, but the property placed on it and injured by the wrongful act of the city was the property of the wife, and, as it is for the injuries to this property that the action was brought, she is the proper plaintiff. We suppose

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it to be clear that two persons may have an interest in the leasehold estate, and one of them to be the sole owner of the property placed on the demised premises, and this is such a case.

Judgment reversed, with instructions to overrule the demurrer to the complaint.

Filed June 19, 1885.

No. 11,291.

HELMS v. WAGNER.

PRACTICE.—*Exceptions to Conclusions of Law.*—Where exceptions to conclusions of law upon facts specially found are taken before any other step in the cause by the excepting party, this is sufficient, although preceded by motions by opposite party.

SAME.—By excepting to conclusions of law alone the facts are admitted to have been correctly found.

TAX SALE.—*Charging Wife's Land in Name of Husband.*—Under the tax laws of 1872, and, also, of 1881, the fact that a wife's land is charged on the tax duplicate in the name of the husband, would not invalidate a sale of such land for taxes.

SAME.—*Personal Property.*—A sale of land for taxes, without first exhausting personal property, is invalid.

SAME.—*Interest.*—Under sections 3 and 4 of the amendatory act of March 5th, 1883, a purchaser of land for taxes under the act of December 21st, 1872, where the title proves invalid, is only entitled to a lien for the purchase-money and all subsequent taxes paid by him, with interest thereon at the rate of twenty per centum.

From the Huntington Circuit Court.

J. C. Branyan, M. L. Spencer, R. A. Kaufman and W. A. Branyan, for appellant.

J. B. Kenner and J. I. Dille, for appellee.

Howk, J.—This was a suit by the appellant, Helms, as plaintiff, to quiet her title to certain real estate in Huntington county. The appellee, Wagner, answered the appellant's complaint by a general denial, and, also, filed a cross com-

102	385
181	196
102	385
134	605
136	321
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138	130
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141	545

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plaint, wherein he asked that his title to the same real estate might be quieted. Appellant answered the cross complaint by a general denial. The issues joined were tried by the court, and, at the appellee's request, the court made a special finding of facts and stated its conclusions of law thereon, in favor of the appellee. Over the appellant's exceptions to the conclusions of law the court rendered judgment in accordance therewith.

The only error relied upon by the appellant, and presented by the record, is the alleged error of the trial court in its conclusions of law upon the facts specially found. The point is made by appellee's counsel, and insisted upon strenuously, that no question is presented by this alleged error for the decision of this court, because the record fails to show that appellant excepted at the time to the conclusions of law. This point is not well taken. The record shows that when the court made its special finding of facts and stated its conclusions of law thereon, and ordered the same to be recorded, the appellee moved the court for judgment in his favor on his cross complaint, upon the special finding of facts, which motion was overruled; and that appellee then filed his written motion for a new trial. Then the record shows that on the same day, and as the first step taken by appellant, she excepted to the court's conclusions of law. It is claimed on behalf of the appellee that this record does not show that appellant excepted to the court's conclusions of law at the time the decisions were made, because the entry of his motions precedes the entry of her exceptions in the record. Notwithstanding this fact, we think that the record clearly shows that the appellant excepted at the time to the court's conclusions of law. Appellant's exceptions and appellee's motions could not possibly be entered at the same instant of time and on the same lines of the record; and the mere fact that the entry of his motions precedes the entry of her exceptions in the record, does not show that her exceptions were not taken at

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the time the decisions were made. *Dickson v. Rose*, 87 Ind. 103.

The facts specially found by the court were, in substance, as follows:

1. On the 20th day of February, 1880, the appellant owned the land described in her complaint, and her husband, William M. Helms, owned thirty acres adjoining the same on the north. Both tracts were listed and entered for taxation in one tract, in the name of said William M. Helms. The forty-eight acre tract of such land was owned by appellant, by deed recorded in the recorder's office of such county, prior to the assessment of such taxes, but was not separately transferred for taxation. On said February 20th, 1880, both of such tracts were charged with \$109.06, as delinquent and current taxes, and the said forty-eight acres, so belonging to appellant, were sold by the treasurer of such county for such taxes to the appellee, who bid and paid for the same, on that day, such sum of \$109.06.

2. Before such lands were advertised for sale the delinquent taxes thereon were demanded by the deputy county treasurer and tax-collector from the appellant, who failed to pay the same or any part thereof. No demand for property to pay such taxes was ever made of the appellant.

3. The appellant, for two years preceding such sale and at the time thereof, was the owner of personal property, to wit, horses, cattle, household goods, etc., to the value of at least two hundred dollars. No levy on any of such property was ever made to pay such taxes, or any part thereof.

4. The appellant during the times hereinbefore mentioned lived on such lands and had such personal property in her possession thereon.

5. The appellee received a deed from the auditor of such county for such lands on such sale, on the 22d day of February, 1882.

6. The appellee paid \$11.69 taxes on such land on the 28th day of February, 1882.

7. On the 4th day of November, 1882, the appellant ten-

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dered the appellee \$140, in gold coin, in payment of such sums so paid by him, but did not pay the same to the clerk, but tendered it again on the trial of the case.

Upon the foregoing facts the court stated its conclusions of law as follows:

1. Appellee's tax deed for such land, found in finding No. 5 above, is invalid to convey the title to such real estate to him.

2. The sale of such real estate for taxes, as found in finding No. 1 above, was invalid to convey the title to such real estate to the appellee.

3. The appellee has a lien on the appellant's land, described in her complaint, for the amount he paid on such tax sale, found in finding No. 1 above, and for the taxes he has since paid, found in finding No. 6 above, with twenty-five per cent. interest per annum from dates of payment, as in such findings found, until the present, amounting to the sum of \$214.50, for which sum he should have judgment, and have the same declared a first lien on such land of the appellant, described in her complaint.

4. The appellee should recover costs in this cause.

In discussing the alleged error of the court in its conclusions of law, appellant's counsel earnestly insist that the county officers were not authorized and had no power under the law to sell her land for the payment of taxes due from her husband upon his real estate. As a legal proposition, this may be conceded to be correct; but we fail to see how it can possibly benefit the appellant in this case. Doubtless, when she acquired her land, she might have caused it to be listed and assessed for taxation in her own name, instead of the name of her husband; but this she did not do. It was not found by the court, and we can not assume, that she was even ignorant of the fact that her land was listed and assessed in her husband's name; indeed, as the appellant presents her case in this court solely upon her exceptions to the conclusions of law, she admits that the facts of her case were fully and cor-

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rectly found by the trial court, but says that the court erred in its application of the law to the facts so found in its conclusions of law. *Cruzan v. Smith*, 41 Ind. 288; *Robinson v. Snyder*, 74 Ind. 110; *Braden v. Graves*, 85 Ind. 92; *Fairbanks v. Meyers*, 98 Ind. 92.

Upon the facts found by the court we think that the appellant's objection to the tax sale, upon the ground that her land was sold for the payment in part at least of taxes due on her husband's land, can not be made available to her for the reversal of the judgment, in whole or in part. The tax sale was made on February 20th, 1880, at which time the tax law of December 21st, 1872, was in force. Under that law the fact that appellant's land was listed or charged on the tax duplicate in the name of her husband, and not in her own name, would not invalidate the tax sale of such land. In section 230 of that law it was thus provided: "The sale of lands for taxes shall not be invalid on account of such lands having been listed or charged on the duplicate in any other name than that of the rightful owner." 1 R. S. 1876, p. 125. This provision was literally re-enacted in the tax law of March 29th, 1881, and is still in force. Section 6489, R. S. 1881. The tax sale and deed of the appellant's land were correctly held to be invalid to convey the title to the land to the appellee, because the court found the facts to be that she owned and had on such land, at and before the time of such sale for taxes, personal property of a value more than sufficient to pay such taxes. The personal property of the owner of land is primarily liable to distress and sale for the payment of all the delinquent taxes of such owner; and until such personal property, if any there be, has been exhausted, there can be no legal or valid sale of such owner's land. This is the settled law of this State on this point. *Abbott v. Edgerton*, 53 Ind. 196; *Ward v. Montgomery*, 57 Ind. 276; *Smith v. Kyler*, 74 Ind. 575; *Woolen v. Rockafeller*, 81 Ind. 208; *Pitcher v. Dove*, 99 Ind. 175.

We conclude, therefore, that the trial court did not err in

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holding in its first and second conclusions of law, that the tax sale and deed of the appellant's land were invalid to convey the title to the land to the appellee.

Appellant's counsel also claim that the trial court erred in its third conclusion of law, in that it allowed the appellee a higher rate of interest on the taxes paid by him than was authorized by the statute. This point is well taken, though not to the extent claimed by the appellant. The record shows that this cause was tried by the circuit court on the 26th day of March, 1883, and taken under advisement; and that, on the 16th day of June, 1883, the court's special finding of facts and conclusions of law were filed and recorded. In its third conclusion of law the court, as we have seen, allowed appellee interest at the rate of twenty-five per cent. per annum. Before the trial of this cause the act of March 5th, 1883, amending certain sections of the tax law of March 29th, 1881, took effect and has since been the law. In the recent case of *Peckham v. Millikan*, 99 Ind. 352, the precise question we are now considering was before this court. It was there held, in construing the provisions of sections 3 and 4 of such amendatory act of March 5th, 1883 (Acts 1883, p. 95), as applicable to such case, that a purchaser of land for taxes under the act of December 21st, 1872, where the title proves invalid, is only entitled to a lien for the purchase-money, and all subsequent taxes paid by him, with interest thereon at the rate of twenty per cent. per annum. Upon the authority of the case last cited it must be held in this case, that the trial court erred in allowing the appellee interest at a higher rate than twenty per cent. per annum in its third conclusion of law.

The appellee has assigned as a cross error the overruling of his demurrer to appellant's complaint. The complaint was sufficient. Appellant alleged therein that she owned the land in controversy, and that appellee was asserting title thereto under a tax sale and deed, which, by reason of certain facts stated, were invalid to convey to him the title to the land, and she asked that her title to the land might be quieted. The

 Flint et al. v. Cook.

complaint was good as a complaint to quiet title, and the fact that it contained some insufficient averments in relation to an alleged tender, did not render it bad on appellee's demurrer. These averments may properly be regarded as surplusage, and surplusage does not vitiate that which is good.

The judgment is reversed, with costs, and the cause is remanded, with instructions to the court to restate its third conclusion of law in accordance with this opinion, and render judgment accordingly.

Filed June 20, 1885.

 No. 11,902.

FLINT ET AL. v. COOK.

CONTRACT.—*Sale of Wind-Mill.—Conditions.—Pleading.*—The contract of sale of a wind-mill contained the following stipulation: "If you accept this order and ship me the goods ordered above, it is with the distinct understanding, and is a part of this contract, that if the wind-mill does not work well for sixty days after erected, I am to notify you and give you ninety days after receipt of such notice by you in which to remedy the defect, and if you can not make it work well you are to remove the wind-mill and release me from the amount which I have paid for said mill as above stipulated." On the reverse side of the contract was written the following, which was signed by the seller's agent: "The condition of this sale is that D. G. erects the mill, and after ninety days, if the mill suits J. C., he agrees to settle on the conditions named in the within order." Action to recover the price of the mill.

Held, that the purchaser did not have the right to arbitrarily say he was not suited and reject the mill, but he was only relieved from keeping it by reason of any defect or failure to perform, which the seller failed, upon notice, to remedy.

Held, also, that a paragraph of answer alleging generally that the "wind-mill did not work well," and another alleging that the plaintiff's agent "wholly failed to cause the same to work sixty days, or any other period of time, or to work at all," and another alleging that it "never did work, never was of any use or value to the defendant, because it would not pump water for stock, nor do any other thing for which it was intended," but each failing to aver the particulars in which it was defective, are not sufficient.

From the Hancock Circuit Court.

108	391
196	141
102	391
137	189

Flint *et al.* v. Cook.

J. H. Mellett, E. Marsh and W. W. Cook, for appellants.
J. A. New and J. W. Jones, for appellee.

MITCHELL, C. J.—This suit was brought to recover the price of a wind-mill, which it is alleged was sold and delivered by Flint, Willing & Co., of Kendallville, Indiana, to James M. Cook. The contract of sale is in writing, and contained among other stipulations the following: "If you accept this order and ship me the goods ordered above, it is with the distinct understanding, and is a part of this contract, that if the wind-mill does not work well for sixty days after erected, I am to notify you and give you ninety days after receipt of such notice by you in which to remedy the defect, and if you can not make it work well you are to remove the wind-mill and release me from the amount which I have paid for said mill as above stipulated. A defect in any one article used on this job to affect price and purchase of that article only." On the reverse side of the contract there was written the following stipulation, which was signed by the plaintiffs' agent: "The condition of this sale is that D. H. Goble erects the mill, and after ninety days, if the mill suits James M. Cook, he agrees to settle on the conditions named in the within order." To the complaint, with which the written contract was filed as an exhibit, and upon which no question is made, there was an answer in four paragraphs, one of which was the general denial and three special answers.

The material part of the second paragraph set up as a ground of defence the following: "That said wind-mill did not work well at any time after erected, and that within a reasonable time after the expiration of sixty days, after the erection of said mill, to wit, within thirty days thereafter, the defendant notified the plaintiff and his agents that said mill did not work well, and demanded that said plaintiff remove the same from his premises," etc.

The third paragraph, after averring the contract and modification thereof as contained in the stipulation on the reverse

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side, and the delivering of the mill to defendant, alleges: "That thereafter said Goble, agent as aforesaid, undertook to erect said wind-mill, but wholly failed to cause the same to work sixty days, or any other period of time, or to work at all; that said mill therefore did not suit the defendant. All of which the plaintiff had notice before the institution of this suit." This paragraph also avers that the defendant, before the institution of the suit, notified plaintiff to remove the mill and release him from his contract.

The fourth paragraph avers the contract, and that the plaintiffs "thereunder constructed or pretended to construct the certain mill, but the same never did work, never was of any use or value to the defendant, because the same would not pump water for stock, nor do any other thing for which it was intended when purchased," and it is alleged that in consequence of such failure the consideration for the contract failed.

Separate demurrers were filed and overruled to each of the foregoing answers, and these rulings are assigned and insisted upon as errors.

For the reasons stated in the case of *McClamrock v. Flint*, 101 Ind. 278, the second paragraph of answer was palpably bad. To say that the wind-mill did not work well is not an allegation of any defect in the mill. It is nothing more than the expression of an opinion, without stating any facts upon which an issue can be made.

Under the contract, as we interpret it, the sale was upon the condition that the plaintiffs should furnish and erect the wind-mill; that when erected it should work to the satisfaction of the defendant for the period of ninety days. If at any time within ninety days from the time of its erection it should fail to work satisfactorily on account of any defect in its construction, or other imperfection, the plaintiffs were to be notified, when, if within the ninety days succeeding such notice they should fail to remedy the defect, and make the mill work

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satisfactorily for the purposes intended, they were to remove it, and the contract was to be at an end.

It is argued by counsel for the appellee, that because of the modification or stipulation written on the back of the contract, the transaction did not constitute a sale on condition, and that the appellee had the right arbitrarily to say he was not suited, and reject the mill and demand its removal. We do not think the contract susceptible of this meaning. That a contract may be so made as that the purchaser may, out of mere caprice or whim, refuse to receive, or, having received on trial, may refuse to retain, an article of personal property contracted for, we have no doubt. But before a contract would be so construed it must clearly appear from its terms that the purchaser was to have the unqualified option of refusing to receive the article furnished or manufactured for him without regard to its suitableness for the purpose for which it was furnished. Such was the case of *Brown v. Foster*, 113 Mass. 136. There the plaintiff contracted to make a suit of clothes, which, according to the contract, were to be made to the satisfaction of the defendant. The clothes were made and received, were not satisfactory, and were returned. The plaintiff proved by other tailors that with some slight alterations which he had offered to make the suit was a good fit, but the court said: "Although the compensation of the plaintiff for valuable service and materials may thus be dependent upon the caprice of another who unreasonably refuses to accept the articles manufactured, yet he can not be relieved from the contract into which he has voluntarily entered." To the same effect are *McCarren v. McNulty*, 7 Gray, 139, and *Gibson v. Cranage*, 39 Mich. 49. To the contrary see *Manufacturing Co. v. Brush*, 43 Vt. 528, and *Daggett v. Johnson*, 49 Vt. 345.

It might plausibly be contended, but we do not decide the question, that the contract under consideration was within the principle ruled in the foregoing cases, which hold that a purchaser may arbitrarily refuse to retain an article if there was nothing more of it than the stipulation which was writ-

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ten on the reverse side. But the whole must be construed together, and, when so construed, it means that if the mill should not suit the purchaser on account of any defect or failure to perform, which the plaintiff failed upon notice to remedy, then he was to be relieved from keeping it. *Clark v. Rice*, 46 Mich. 308.

The third paragraph of answer is likewise insufficient. This paragraph avers that Goble, the plaintiffs' agent, "wholly failed to cause the same to work sixty days, or any other period of time, or to work at all," and that the mill, therefore, did not suit the defendant.

No defect in the mill is alleged. That Goble failed may have been on account of his neglect or inexperience rather than because the mill was defective or imperfect. There is no averment of a failure of the mill to work on account of any defect or imperfection in its plan, construction or manner of erection, and notice of the fact to the plaintiffs within ninety days, nor is there any averment that the defendant tried to operate the mill and failed. The averment is that Goble failed, not the mill.

Under their contract the plaintiffs were bound to furnish and erect the mill so that the defendant could use it for the purposes intended, and upon notice within the time limited that it failed to perform as designed, cause it to work satisfactorily or take it away.

The fourth answer avers that the mill "never did work, never was of any use or value to the defendant, because it would not pump water for stock, nor do any other thing for which it was intended." For reasons already stated this answer was manifestly insufficient. See *Neidefer v. Chastain*, 71 Ind. 363 (36 Am. R. 198).

As the case must be reversed for the error in overruling the demurrers to the several answers above mentioned, and as the other questions discussed may not arise on a second trial, we do not extend this opinion further to notice them.

Judgment reversed, with costs, with directions to the court

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below to sustain the demurrers to the answers above mentioned, and for further proceedings in accordance with this opinion.

Filed June 16, 1885.

No. 11,726.

TROYER ET AL. v. DYAR, COMMISSIONER OF DRAINAGE.

DRAINAGE.—Notice.—Names of Owners.—Petition.—Section 4274, R. S. 1881, requires that the names of owners of lands assessed for benefits arising from the construction of a ditch shall be stated in the petition if known, and a failure to name such owners renders the proceedings void.

SAME.—Estoppel.—Pleading.—No intendments are made in favor of a plea of estoppel, but it is incumbent upon the party pleading it to aver all the facts essential to its existence.

SAME.—Assessment.—An answer of estoppel pleaded to an action to set aside a drainage assessment is not good unless it avers that the plaintiff had knowledge of the fact that his land was assessed.

From the Howard Circuit Court.

J. C. Blacklidge, W. E. Blacklidge and B. C. H. Moon, for appellants.

M. Garrigus, for appellee.

ELLIOTT, J.—The appellants allege in their complaint that they are the owners of forty acres of land, that they acquired title by deed from David and Tuby Foster, and that the Fosters derived title by deed from Christian F. Weaver, executed on the 8th day of August, 1882; that the deed from Weaver to the Fosters was duly recorded on the 2d day of September, 1882, and that one from the Fosters to the appellants on the 12th day of September, 1882. It is further alleged that a petition asking for the establishment of a ditch was filed on the 13th day of September, 1882, and in the petition it was alleged that the proposed ditch would affect the land of Christian F. Weaver; that such proceedings were afterwards had that an order for the construction of the ditch was entered, and

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that the land assessed against Weaver, but owned by the plaintiff, would be benefited in the sum of \$70. It is also averred that the plaintiffs did not have notice of the petition; that they were not named in the petition, or notice, or in any of the proceedings; that the only notice ever given of the filing of the petition was by posting printed notices on the 11th day of September, 1882. The prayer of the complaint is that the assessment may be set aside. To this complaint the appellee answered that he was the duly elected commissioner of drainage; that on the 13th day of September, 1882, John Davis filed a petition praying for the establishment of a ditch. The answer sets forth the allegations of the petition from which it appears that it was in all respects a valid and sufficient petition, and the answer also sets forth the proceedings taken in the matter, from which it appears that the notices in Howard county were posted on the 9th and 11th days of September, and that an order for the establishment of the ditch and the assessment of the land was made, which is regular on its face and is in due form. After setting forth the proceedings for the establishment of the ditch, the answer alleges the execution and recording of the deeds as alleged in the complaint, but that at the time of filing the petition and posting the notices the land appeared on the last tax duplicate to be owned by Christian F. Weaver; that immediately after the recording of the notice of the lien the appellee awarded the contract for the construction of the ditch, and the contractor at once entered upon the work; that the plaintiffs then resided on the lands and knew that the contract for the construction of the ditch was being awarded; that, to copy the language of the pleader, "they knew the said ditch was being so established, and especially that it was being constructed month after month during the spring, summer, fall and winter of 1883, and yet they stood by, being cognizant of their rights, and took no steps to arrest the construction, which they might and could have done before such expenses were incurred or such contract awarded." The an-

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swer shows that the land was properly described, but that the name of the owner was erroneously given as Christian F. Weaver. The court overruled a demurrer to this answer, and the question for our decision arises upon this ruling.

The controlling question in the case is whether the error in giving the name of Weaver, as owner, instead of the appellants, makes the proceedings void. This is the real question, for, if not void, then the remedy was by appeal; but if void, then this action is well brought.

It is said by appellee's counsel that when the notices were posted the appellants were not the owners of the land, and that their deed was not recorded until the day after the posting of the notices. The difficulty in maintaining this position is, that Weaver, the party named in the petition and notices, had sold to the Fosters in August, and their deed was on record on the 2d of September. The notice was, therefore, not to the owner; had it been, doubtless, the appellants, as subsequent purchasers, would have been bound. They, however, were not bound by a notice to a remote grantor, given after he had parted with title.

The question turns upon whether the owner of land, against which benefits are assessed, must be named in the petition; if this was necessary, then naming some one else can not be sufficient. It has been decided that it is necessary to name the owner, and this decides the question. *Vizzard v. Taylor*, 97 Ind. 90; *Wright v. Wilson*, 95 Ind. 408; *Young v. Wells*, 97 Ind. 410. The statute provides that the petition shall "give the names of owners thereof if known, and when unknown shall so state." R. S. 1881, section 4274. This is a clear statutory requirement, and the cases to which we have referred, and to which many more might be added, declare that in such cases as this the statute must be pursued. The form of the petition given by the statute names owners, and this, taken in connection with the provision quoted, leaves no room for doubting that the Legislature meant that known owners should be named in the petition. If the statute is not obeyed there

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is no jurisdiction, and if no jurisdiction then the proceedings are invalid.

It is a familiar rule that an estoppel must be specially pleaded, and that strictness in pleading it is essential. No intendments are made in favor of a plea of estoppel, and it is incumbent upon the pleader to fully plead all the facts essential to the existence of an estoppel. *Lash v. Rendell*, 72 Ind. 475; *Robbins v. Magee*, 76 Ind. 381; *Sims v. City of Frankfort*, 79 Ind. 446.

In the plea before us there is at least one essential fact lacking, and that is, the fact that the appellants knew of the assessment against the land. They may have known of the construction of the ditch, and yet have had no notice of the assessment against the land; and, as the complaint seeks only to set aside the assessment, and not to prevent the construction of the ditch, it was indispensably necessary for the appellee to show that they had knowledge of the burden imposed upon the land. We can not infer that they had notice of the assessment; that is a matter to be directly averred and not left to inference. It is unnecessary to inquire whether there are, or are not, other defects in the answer; the one pointed out is sufficient to condemn it, considered as a plea of estoppel, and we decide nothing more at present than that this defect renders the answer bad.

Judgment reversed.

Filed June 20, 1885.

102	399
132	202

No. 11,539.

THE PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY
COMPANY v. KIRK.

MASTER AND SERVANT.—*Scope of Authority.*—*Liability of Master for Injury to Another.*—Where a servant is engaged in accomplishing an end which is within the scope of his employment, and while so engaged adopts means reasonably intended and directed to the end, which result in injury to another, the master is answerable for the consequences, regard-

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less of the motives which induced the adoption of the means; and this, too, even though the means employed are outside of his authority, and against the express orders of the master.

SAME—Negligence.—Where C., a section foreman, returning with his crew and hand-car from work, encounters obstructions on the line of his employer's road, and thereupon directs the car to be transferred to the track of a parallel line operated by another company, as occasionally had been done before, but without the knowledge or consent of either company, and while proceeding on such track his car is negligently propelled against the car containing the section men of such road, whereby one of the latter is injured, C.'s employer is liable.

From the Marion Superior Court.

T. A. Hendricks, C. Baker, O. B. Hord, A. W. Hendricks, A. Baker and E. Daniels, for appellant.

H. N. Spaan, for appellee.

MITCHELL, C. J.—There is involved in this record but a single question, the solution of which depends upon the law applicable to the following facts: Eastward from the city of Indianapolis for some miles, the lines of the Pittsburgh, Cincinnati and St. Louis and the Cincinnati, Hamilton and Indianapolis Railways lie parallel, and a few feet distant from each other. On the 25th day of August, 1882, Dennis Cronin was a section foreman in the service of the former, and Richard Kirk was, at the same time, in like service for the latter. Each had control of a "crew," a hand-car and the requisite tools for repairing track. The daily routine of Cronin's duty was to meet his crew each morning at 7 o'clock, proceed on the car with men and tools along the line of his section, direct such repairs as were required, and return in like manner with car, tools and men, to the tool-house near the depot, arriving at 6 o'clock P. M. On the evening of the date mentioned after quitting work, and while thus returning from the east end of his section, Cronin encountered an engine and train of cars which obstructed his further progress on the line of his employer's road, and he thereupon directed the car to be transferred from the line of the Pittsburgh, Cincinnati and St. Louis Railway Company to that of the Cincinnati,

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Hamilton and Indianapolis Railway Company, and while proceeding on the line of the latter, his car was negligently propelled against the car on which Kirk was proceeding homeward with his crew. As a consequence Kirk was, without fault on his part, thrown from his car and severely injured.

It was shown that no authority whatever existed for the transfer of the car, nor was there any right in the one railway company to use the line of the other. It appeared that occasionally like use had been made of the line of the Cincinnati, Hamilton and Indianapolis Railway Company, by the trackmen of the Pittsburgh, Cincinnati and St. Louis Railway Company, but it does not appear that this was known to or authorized by the officers of either company, nor was the use so frequent as to raise an inference of knowledge.

Kirk brought suit against the Pittsburgh, Cincinnati and St. Louis Railway Company and had a verdict and judgment, and the question is, whether upon the foregoing facts the finding and judgment can be upheld.

The argument is pressed with much force and ingenuity, that because the duties of Cronin and his crew pertained wholly to the appellant's line, and as they had no authority either express or implied to go upon the track upon which the injury occurred, they were at the time within neither the line of duty nor scope of their employment, and that being thus outside of both the employer is in consequence not liable for their misconduct.

It is further contended that inasmuch as at the time of the injury Cronin and his men had quit work, and were proceeding homeward, the transfer of the hand-car, for the purpose of avoiding the obstruction, was a mere incident to the service in which they were engaged, resorted to for their own convenience, and for that reason the employer is exempt from liability for the resulting injury.

The inquiry in hand embraces the following considerations:

1. Was the servant at the time engaged in prosecuting the

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business of the master, with authority, either express or implied, to accomplish in some manner an end then in view, and did the wrongful or injurious act have relation to the consummation of such end?

2. Was the manner chosen by the servant, resulting in the injury complained of, so far incident to the end in view as that it was reasonably, under the circumstances, designed for its attainment? or was it for some purpose merely personal to the servant, having no relation to or fitness for the accomplishment of the business in which he was engaged?

Whether a servant in a given case was acting within the scope of his employment, in pursuance of his line of duty, or, on his own responsibility, in pursuit of his own pleasure or convenience, must usually depend upon the facts in such case. To undertake to lay down a general rule applicable to all cases would not only be difficult, but impossible. But we think this much may be said, where a servant is engaged in accomplishing an end which is within the scope of his employment, and while so engaged adopts means reasonably intended and directed to the end, which result in injury to another, the master is answerable for the consequences, regardless of the motives which induced the adoption of the means; and this, too, even though the means employed were outside of his authority, and against the express orders of the master. 2 Thomp. Neg. 889, section 6; Wood Master and Servant, pp. 593, 594.

In the case of *Philadelphia, etc., R. R. Co. v. Derby*, 14 How. 468, the question was said to be in all such cases, not whether the servant was obeying or disobeying the master's orders, but whether or not he was at the time acting in the course of his employment, or was in the relation of servant to the master.

Where a servant steps aside from the master's business and does an act not connected with the business, which is hurtful to another, manifestly the master is not liable for such act, for the reason that having left his employer's business, the relation of master and servant did not exist as to the wrong-

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ful act; but if the servant continues about the business of the employer, adopts methods which he deems necessary, expedient or convenient, and the methods adopted prove hurtful to others, the master is liable.

The point is well illustrated by the case of *Quinn v. Power*, 87 N. Y. 535 (41 Am. R. 392). In that case the pilot of a ferry boat plying between the city of Hudson and the village of Athens, on the Hudson river, when about starting on a regular trip from one point to the other, invited a boatman on board, promising to put him on board his boat, which was lying mid-river and out of the course which it was the pilot's duty to pursue in making his trip. In attempting to deliver the boatman on his boat the ferry boat collided with a tow attached to the canal boat, and the plaintiff's intestate was thrown from the canal boat into the river and drowned. The case was decided upon the basis that the deviation from the usual and selected route was without the master's authority, and that but for that fact the injury would not have occurred. FINCH, J., in the course of a learned opinion, said: "In deviating from" the prescribed route, "the servants might disregard the instructions of the master, but they were none the less engaged in the master's business of transporting passengers from Athens to Hudson because they did not follow the usual route, or pursued another or even a forbidden track. They were still doing their employer's work, though in a manner contrary to his instructions. If they stopped the boat in the middle of the river they did not cease to be engaged in the master's business, even if the motive was some purpose of their own, they were still about their usual employment, although pursuing it in a way and manner to subserve also such purpose. * * * They were doing it in a mode and manner perhaps not authorized, and possibly, in some sense, to effect a purpose of their own, but none the less acting within the scope of their employment and engaged in the master's business." *Joel v. Morison*, 6 Car. & P. 501, and *Sleath v. Wilson*, 9 Car. & P. 607, were cited in that case.

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In the first it was held that if a servant, while driving his master's cart on his master's business, make a detour from his usual route, for his own purpose, his master will be liable for damages resulting from the careless driving of the servant while out of his road. The principle decided in the other case was substantially the same.

It has been held by this and other courts, that trackmen and laborers going to and returning from work on a railroad are, during such time, servants of the company, and so far in the line of service that for an injury received while going or coming, through the negligence of a fellow servant, the company is not liable. *Gormley v. Ohio, etc., R. W. Co.*, 72 Ind. 31; *Wilson v. Madison, etc., R. R. Co.*, 18 Ind. 226.

It was part of the section foreman's duty to return with his car, tools and crew over the defendant's track to the tool-house near the depot, as well to observe the condition of the track as to have his car and tools there ready for use at 7 o'clock the next morning. The prescribed route was over the track of the railroad in whose service he was. He had no authority to go upon the other, but encountering an obstacle on the line of his employer, either for his own convenience or possibly to accommodate the other servants of the master, and thus make them better disposed toward it and its service, he judged it convenient or expedient, rather than wait until the appellant's line was cleared, to invade the neighboring line, and by that means he attained the end of delivering the car, tools and crew at their destination. In all this, whatever his motive was, he was pursuing the master's service, that of returning the car, tools and crew to their appointed place, as was his custom and duty, and while he pursued the service, in an unauthorized and possibly forbidden way, he and those with him were, during the time, in the relation of servants to the appellant. Concede that in going off the employer's line he pursued a course which was beyond his authority, his purpose in doing so was neverthe-

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less to accomplish an end within his employment and reasonably, as he supposed, fitted to reach that end.

The case of *Marrier v. St. Paul, etc., R. W. Co.*, decided by the Supreme Court of Minnesota, 15 Am. and Eng. Railroad Cases, 135, is not opposed to the conclusion here reached. In that case it appeared that the trackmen built a fire on the right of way of the railway company for the purpose of warming their coffee. They negligently permitted the fire to escape to an adjacent field, and it was held that the company was not liable. The case is rested upon the ground that in preparing their dinner on the right of way the trackmen were engaged exclusively in their own business, as much so as they would have been in doing the same thing in their homes, or as if they had gone into the plaintiff's field and built the fire there for the same purpose. So, in the case of *Aycriggs v. New York, etc., R. R. Co.*, 30 N. J. L. 460, relied on by appellant. It appeared in that case that the captain of a ferry boat, which was lying at the wharf, seeing a barge on fire in the river, without any orders to do so, went out into the river and undertook to tow the burning barge up the stream. In doing this the burning barge came in contact with another boat to which fire was communicated and which was damaged. It was held that going in aid of the burning barge was outside of the scope of the captain's employment, and the master was not liable. The case is like that of a coachman who should take his master's coach and horses from his stable without authority and go in pursuit of an object not connected with his master's service. There would be no liability of the master.

In this case it can not be said that the servant had stepped aside from the master's service for a purpose of his own. The most that can be said of it is that in accomplishing an end within the scope of his employment he adopted a method wholly unauthorized, which was possibly resorted to to accommodate himself and those under him; but whatever the motive may have been, since the end aimed at was, as averred

Grimes *et al.* v. Coe *et al.*

in the complaint and as the judgment must have found, within the line of service, it can not be said upon the evidence that he was acting without authority in a matter not connected with his employment.

We think that in ruling on the complaint and in overruling the motion for a new trial, no error was committed, and accordingly the judgment is affirmed, with costs.

Filed June 26, 1885.

No. 10,806.

GRIMES ET AL. v. COE ET AL.

DRAINAGE.—*Report of Drainage Commissioners.*—*Statement of Estimated Cost of Ditch.*—Where the report of the commissioners of drainage states in positive terms that the estimated cost of the construction of the ditch will be less than the estimated benefits, it is sufficient, although in a tabulated statement attached to the report it is shown that the estimated benefits and the estimated expense are exactly equal.

SAME.—*Party Notified can not Take Advantage of Failure to Give Notice to Others.*—A party who has due notice of the proceeding can not take advantage of the failure to notify some other land-owner, unless it appears that such failure will prevent the construction of the ditch.

SAME.—*Township Property.*—A drainage assessment can not be defeated by a land-owner who has been duly notified, upon the ground that an assessment has also been levied upon township property.

From the Tippecanoe Circuit Court.

A. H. Rice and *W. S. Potter*, for appellants.

C. D. Jones and *A. K. Aholtz*, for appellees.

ELLIOTT, J.—The questions presented by the record, as corrected, arise upon the ruling denying a new trial.

The appellants appealed from a judgment of the circuit court establishing a ditch, and assail the finding of the court on various grounds.

The first point made against the finding is shown by the amended record to be not well founded in fact, and it will not be further noticed.

102	406
136	468
102	406
145	144
102	406
158	164

It is argued that the finding was wrong, because the report of the commissioners does not show that the ditch can be constructed for a sum less than the benefits assessed. We think this argument is based on an erroneous construction of the report. The report states in express terms that the ditch can be constructed for a less sum than the estimated benefits. We think this means all expenses, direct and incidental. We do not understand that the commissioners are required to set forth evidence, but that all that is required is that they shall state their conclusions of fact.

It is true that the tabulated statement in the report shows benefits to exactly equal the cost of constructing the ditch, but we think that the positive finding of the commissioners, directly stated, is not controlled by this table of estimates. The tabulated statement was made for another purpose, and was not intended to control the positive finding. The report is in substantial conformity to the provisions of the statute, and we can not hold that the proceedings are to fail simply because of a trifling inconsistency in its statements. *Meranda v. Spurlin*, 100 Ind. 380; *Roberts v. Gieras*, 101 Ind. 408.

It is argued that as no notice was given to one of the parties, against whom an assessment was levied, the proceedings are void as to all the persons assessed. We are not inclined to adopt this view, for we are unwilling to hold that persons properly notified can take advantage of the failure to name in the notice other persons against whom benefits are assessed, unless it be shown that the failure to give such notice will prevent the construction of the ditch. The township of Lauramie, the artificial person that it is said was not notified, is not here complaining; it has not appealed; and without a showing that the failure to notify it, conceding that there was such a failure, prevents the construction of the ditch, it can not be held that those who were notified can escape liability.

It is contended with much earnestness that there is no law authorizing the assessment of townships for benefits to highways, and that, for this reason, the proceedings are invalid,

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and may be attacked by other persons assessed for benefits ; but this contention can not prevail. We do not think it can be said that an assessment for such purposes against a township can be said to be void, for it may be that the benefits are so apparent, and so much add to the condition of the highway that the township trustee may elect to pay them, and in such a case other parties could not be injured, and unless injured they would have no just reason to complain. But we need not pursue this inquiry further, for it was decided in *Young v. Wells*, 97 Ind. 410, that townships may be assessed for benefits to highways. The court there said: "These sections taken together, we think, authorize the assessment of townships for benefits to highways." This was a point essential to the decision, and, although it is not placed in the reporter's head-notes, it was one of the principal points decided in that case.

Judgment affirmed.

Filed June 24, 1885.

No. 11,835.

BEARD v. LOFTON.

CONTRACT.—Construction of.—Mistake.—In the construction of contracts the leading purpose is to ascertain the true meaning of the contracting parties ; but in doing this courts are confined to the contract as written, in the absence of proper averments of mistake.

SAME.—Decedents' Estates.—Agreement as to Distribution Among Heirs.—Will.—Under an agreement, signed by the heirs of L., that "in the distribution of" his estate B. "shall receive an equal share with each other child," said B. is entitled to share in the common estate, if any, in which each is entitled to share, and not in personal property and lands which have been disposed of by will to one of such other children.

SAME.—"Distribution."—Presumption.—In the absence of a showing to the contrary, it will be presumed that the word "distribution" was used in the statutory and ordinary sense with reference to the personal property and money arising from the sale of real estate by the administrator, remaining after the payment of debts and legacies.

102	408
138	122
102	408
138	598
102	408
141	344
102	408
1171	577

Beard v. Lofton.

SAME.—Parties.—In an action by B. upon such contract, all the signers thereto are necessary parties defendants.

SAME.—Want of Consideration.—Answer of.—An answer that the contract sued on was executed by the defendant without any consideration whatever, is sufficient in form and substance.

EVIDENCE.—Witness.—Practice.—Supreme Court.—A mere offer to prove a fact by a witness, without asking any question to elicit it, is not sufficient to present any question to the Supreme Court upon a ruling rejecting the evidence.

From the Washington Circuit Court.

S. B. Voyles, H. Morris and J. Dailey, for appellant.

D. M. Alsbaugh and J. C. Lawler, for appellee.

ZOLLARS, J.—This action is based upon the following written contract:

“This agreement witnesseth that we, the undersigned children and heirs of Simeon Lofton, deceased, hereby promise and undertake to pay the costs in the cause pending in the Supreme Court of Indiana, in which Mary A. Beard is appellant and David Beck, administrator of said estate, is appellee, and to pay Samuel B. Voyles \$30.06, in consideration that said Mary A. Beard shall dismiss and discontinue said suit and not revive nor recommence the same again; and the undersigned hereby agree that in the distribution of said estate, Mary A. Beard shall receive an equal share with each other child of said Simeon Lofton. April 6th, 1880.

“ALEXANDER LOFTON.

“HARRISON LOFTON.

“THOMAS LOFTON.

“WM. Z. PAYNE.

“CAROLINE PAYNE.”

Appellant brought this action against Alexander Lofton alone. Her complaint was in two paragraphs. The material averments of the second paragraph may be summarized as follows: Before April 6th, 1880, Simeon Lofton, the father of the parties, died testate, the owner of certain described lands. By the terms and provisions of his will, the lands

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were devised to appellee in fee simple, subject only to the life-estate in the mother, who died before this action was commenced. Prior to the making of the contract, appellant had filed a claim against the estate of the father and testator for \$2,200. Upon a trial below she was defeated, and appealed to this court. This is the claim and appeal referred to in the contract, a copy of which was filed with each paragraph of the complaint. It is averred that appellee agreed and promised by said written contract, that appellant should have as much of the estate as should come to his hands. Upon the delivery of the contract to appellant, she dismissed her appeal and abandoned her suit. The land, it is averred, was distributed to and vested in appellee, by reason of the will, and in no other way.

David Beck, as the administrator with the will annexed, had closed up the estate of the father by final settlement before this action was commenced. Appellant received nothing from the estate by distribution or otherwise. The other children, except appellee, got nothing, and were entitled to nothing in the lands under the provisions of the will or otherwise.

Appellee has refused to divide the lands with appellant equally, or in any other way, and has refused to account to her for the value. Prayer for damages against appellant on account of the breach of the contract.

The first paragraph is substantially the same, except that it is there averred that the father left a personal estate, a part of which was devised to appellee.

An issue was made, and the case was tried upon the first paragraph. Appellee demurred to the second paragraph, and stated as grounds of demurrer: *First*. That it did not state facts sufficient to constitute a cause of action against him; and, *Second*. That there was a defect of parties defendants, in that the other persons who signed the contract with him, naming them, had not, but should have been, joined as parties defendants.

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This demurrer was sustained, and appellant excepted. She assigns this ruling as error.

It is said by her counsel that the demurrer was sustained wholly upon the first ground therein stated. But as the record does not show that the case is before us for decision as to whether or not upon either ground, the demurrer was properly sustained. As the first ground of demurrer presents the controlling question in the case, we limit our examination, in the main, thereto.

The complaint alleging neither mistake nor fraud, of course a reformation is not asked for. The contention is that under the contract and the averments in the complaint, appellant is entitled to recover from appellee an amount equal to one-half the value of the land. In the construction of contracts the leading purpose, of course, is to ascertain the true meaning of the contracting parties. But, in doing this, courts are confined to the contract as written, in the absence of proper averments of mistake. The following has been quoted by this court with approval from Mr. Greenleaf: "The terms of every written instrument are to be understood in their plain, ordinary, and popular sense, unless they have, generally, in respect to the subject-matter, as, by the known usages of trade, or the like, acquired a peculiar sense, distinct from the popular sense of the same words; or unless the context evidently points out that, in the particular instance, and in order to effectuate the immediate intention of the parties, they must be understood in some other and peculiar sense." *Evansville, etc., R. R. Co. v. Meeds*, 11 Ind. 273.

We are met at the threshold with this decisive question, What was the estate about which the parties were contracting, and from which appellant was to receive a share? It was stipulated in the contract that in the distribution of the estate of the father, appellant should receive an equal share with each other child. This clearly implies that the estate in which she should share was an estate in which each other child should share. It was in reference to such an estate that the contract

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was made, as is clearly shown by the terms of the contract. This could not have been the lands, because it was utterly impossible for each of the other children to share in them. The lands had been disposed of by the will, and had thus become the absolute property of appellee. The other children could not share in them. It is averred in the paragraph of complaint under examination, that the other signers of the contract, except appellee, "got nothing, and were entitled to nothing in said lands, under the provisions of said will, or otherwise." If the other children were not entitled to share in the lands, clearly they did not constitute the estate, nor a part of the estate, in the distribution of which appellant was to share equally with them. Undoubtedly the contract had reference to an estate in which each of the other children might be entitled to share. Just why appellant should contract to share with the other children we can not say from anything in the paragraph of complaint. It is enough that she did it. We can conceive of reasons, such as an advancement.

She was also to get her share with each other child through "the distribution of the estate." That distribution could not have had relation to the lands, because the other children were not to share in them under any contingency; they had been disposed of by the will.

In the sense of the statute, and in the sense in which the terms are generally used, the distribution of an estate has reference to the personal property and money arising from the sale of real estate by the administrator, among the heirs, after the payment of the debts and legacies. 2 R. S. 1876, p. 543, section 137; R. S. 1881, section 2405. In the absence of a will, the land is not distributed, but descends to the heirs. If there be a will, the lands are not distributed, in the statutory and ordinary sense, but go by force of the will. Until something appears to the contrary, it ought to be presumed that the word "distribution" was used in the statutory and ordinary sense. It should be observed too, that

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so far as shown by the paragraph of the complaint before us, there may have been an estate other than the lands to be distributed. It is not alleged in the complaint that the lands were the only property owned by the father at the time of his death. The contrary, rather, is made to appear.

It is averred that an administrator with the will annexed had been appointed, and had closed up the estate. The real estate, then, was not the only property that might have been contracted about. Whether the estate in the hands of the administrator was exhausted in the payment of debts and legacies, is not shown by any averment in the paragraph of complaint. The inference from the averments in the complaint is, that at the time the contract was made, there was an estate other than the lands to be distributed. And the unavoidable inference from the language of the contract, in connection with the averments of the complaint, is, that such was the estate about which the parties were contracting.

It is averred that appellant received nothing from the administrator, but no wrong is charged upon appellee in that regard. The contention in this paragraph of complaint is confined to the lands. For aught that appears, appellant might have received from the administrator had she sought to do so. We conclude that the second paragraph of the complaint does not show that appellant was entitled to recover from appellee for any part of the value of the lands, and that the demurrer was therefore properly sustained to it. And without taking the time to state reasons here, we are of the opinion also that the other signers of the contract should have been made parties defendants with appellee.

When we come to consider the evidence, under the motion for a new trial, we find that the entire property of the father was disposed of by his will. The lands were devised to appellee in fee simple, subject only to a life-estate in the mother, and the charge of two specific legacies of \$300 each to grandchildren of the testator. Certain specific articles of personal property were also devised to appellee. Following this, the

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will proceeds as follows: "Item 3. I will and bequeath unto my wife, Matilda Lofton, all my personal property of every description not heretofore otherwise disposed of." This will disposed of all the testator's property of every description, making the wife the absolute owner of the personal property other than that devised to appellee. So that, when the contract was made, there was in fact no estate to be distributed to "each other child." The administrator is shown to have taken into his hands some \$5,000 of personal property. In his final report, which was approved by the court after the death of the widow in 1881, he showed that he had turned over to appellee and the widow under the will, \$3,959.42. The balance he paid out on debts, except \$1,372.27 which he turned over to the administrator of the widow's estate. This report and its approval are an adjudication that after the payment of debts the entire personal estate belonged to appellee and the mother. They were the only persons who could, in any sense, be regarded as distributees. It was not possible for "each other child" to share in the estate, until the will should be overthrown, and no one attempted that so far as we know. There was then in fact no estate of the father in which appellant was entitled to share equally with each other child, because there was no estate in which each other child could share. There was, therefore, no estate in the distribution of which appellant was entitled to share. She accepted a contract, limiting the estate in which she should share, to an estate in which each other child should share, and took the risk of there being such an estate. And now that it has turned out that there is and was no such estate, we know of no way, in this action, to relieve her from the embarrassment. Whether she knew of the will of the father, or whether she knew of it, but misunderstood the force and effect of its provisions, is not shown by the complaint nor by the evidence.

It is possible that she did not know of the will, or did not think that it carried all the personal property, and contracted

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with the idea that there would be an estate for distribution to the other children, in which she should share equally with them. Did it affirmatively appear that she and the other contracting parties knew of the will, and understood that by its provisions all of the property was so disposed of that the other children would be entitled to nothing, the case would be somewhat different. Such a state of facts, possibly, would afford plausible ground for an argument that the contract should be so construed as to mean that appellant should have such a share in the estate as each child would have had but for the will. Then it might be said with a degree of plausibility that as the parties knew that there could be no estate in which each other child could share, they must have intended to contract with reference to the property covered by the will, and to measure appellant's interest by the amount that each child would have been entitled to receive had there been no will. Even then, to carry out and enforce such a supposed intention, it would seem to be necessary that the contract should first be reformed, so as to express the intention; but that is not the case before us.

It is not possible to construe the contract as appellant would have it construed. To do this the contract must be made to read that she shall receive an equal share with appellant in the real and personal property which he received under the will. This is impossible without substituting one contract for another.

There being, and having been, no property out of which each other child was entitled to a share, no property for distribution to them, we are compelled, reluctantly, to hold that there is no property out of which appellant is entitled under the contract to receive a share, and that, therefore, she is not entitled to recover against appellee.

It is stated in the record that appellant offered to prove by Samuel Bullington that a large amount of personal property, not mentioned in the will, had come into the hands of appellee. Complaint is made that this offer was rejected.

CROCKER v. HADLEY.

No question is presented for our decision by the record, because no questions were asked of the witness. This has been so ruled by this court, and we content ourselves by a reference to the case of *Higham v. Vanosdol*, 101 Ind. 160.

We may observe in passing, that it was impossible that there should have been any property not covered by the will.

The fourth paragraph of answer filed by appellee is that the contract sued on was executed by him without any consideration whatever. This answer is sufficient in form and substance. *Moyer v. Brand, ante*, p. 301.

Appellant contends that it is insufficient, because it purports to, but does not, answer the whole complaint. We think otherwise. It assails the contract upon which the action is based, and if that falls the whole case necessarily falls with it.

Finding no error in the record for which the judgment should be reversed, it is affirmed, with costs,

Filed June 27, 1885.

No. 11,693.

CROCKER v. HADLEY.

LIBEL.—*Definition.*—Any written or printed publication which holds a person up to scorn or ridicule, or to a stronger feeling of contempt or execration, or which imputes or implies his commission of a crime not directly charged, is libellous.

SAME.—*Excessive Damages.*—*Practice.*—Where the amount of damages has been determined by a jury and approved by the trial court, it must appear at first blush to be grossly excessive to secure a reversal of the judgment.

SUPREME COURT.—*Weight of Evidence.*—Where there is evidence tending to sustain the verdict, the Supreme Court will not disturb it on the weight of the evidence.

From the Wayne Circuit Court.

D. W. Comstock and *J. H. Kibbey*, for appellant.

H. C. Fox, *W. A. Peelle* and *J. F. Robbins*, for appellee.

102	416
181	233
102	416
134	683

Crocker v. Hadley.

Howk, J.—This was a suit by the appellee, Hadley, to recover damages from the appellant, Crocker, for his publication of an alleged libel. The cause was put at issue and tried by a jury, and a verdict was returned for the appellee, assessing his damages in the sum of two hundred and fifty dollars. Over the appellant's motion for a new trial judgment was rendered against him on the verdict.

Several errors are assigned by appellant in this court, but his counsel has confined his argument chiefly to the alleged error of the court in overruling his motion for a new trial. Counsel say: "It is admitted by the appellant that he wrote and procured the publication of the alleged libellous article." Appellant's counsel claim, however, that the innuendoes in appellee's complaint place a forced and unnatural meaning on the language used in the published article, and, to some extent, this may be true. The published article is too long to be copied in this opinion, but it denounced the appellee as a "hoary-headed filcher," and charged that "John C. Hadley has sold himself, Judas-like, for a few pieces of silver, to sell his neighbors out." We need not argue for the purpose of showing that the publication of an article, containing such expressions as those quoted, in a public newspaper, is a libellous publication. It is not necessary that a crime should be charged in accurate or technical language, in a written or printed publication, in order to constitute such publication a libel. Any written or printed publication which holds a person up to scorn or ridicule, or to a stronger feeling of contempt or execration, or which imputes or implies his commission of a crime not directly charged, is a libellous publication. This is the settled law on this subject in this State. *Gabe v. McGinnis*, 68 Ind. 538, and authorities cited; *Bain v. Myrick*, 88 Ind. 137; *Young v. Clegg*, 93 Ind. 371; *Hake v. Brames*, 95 Ind. 161.

There is evidence in the record which tends to sustain the verdict on every material point. In such case, as has often

been decided, this court will not disturb the verdict on what might seem to be the weight of the evidence. *City of Anderson v. O'Conner*, 98 Ind. 168. It is claimed also that the damages assessed were excessive, but we can not reverse the judgment on this ground. In truth, the transcript is incomplete, and fails to show, in any manner, that all the evidence given in the cause was made a part of the record. In such a case as this the amount of the plaintiff's damages is a question for the jury, and where their verdict has met the approval of the trial court, the judgment will not be reversed on the ground of excessive damages, unless they appear at first blush to be grossly excessive. *City of Evansville v. Worthington*, 97 Ind. 282.

We have found no error in the record of this cause which authorizes or requires the reversal of the judgment.

The judgment is affirmed, with costs.

Filed June 23, 1885.

No. 11,901.

STOUT v. TURNER ET AL.

SUPREME COURT.—Assignment of Error Attacking Complaint.—Practice.—

An assignment of error in the Supreme Court, that the complaint does not state sufficient facts to constitute a cause of action, questions the entire complaint, and if any paragraph is sufficient such assignment can not be sustained.

SAME.—Sufficiency of Evidence.—When all the evidence is not in the record the Supreme Court can not pass upon its sufficiency.

SAME.—Practice.—Bill of Exceptions.—Omitted Evidence.—A general statement in a bill of exceptions that it contains all the evidence is controlled by an affirmative showing to the contrary.

INSTRUCTIONS TO JURY.—In the absence of the evidence, instructions refused will be deemed properly refused because not applicable to the case made; nor will instructions given work a reversal of the judgment unless erroneous under any supposable state of facts.

SAME.—Compromise of Crime.—A complaint to cancel a note alleged to have been executed at the demand of and taken and received by the defendant "in full satisfaction and compromise of the crime of larceny,

102 418
130 428

102 418
140 545
143 366

102 418
152 318

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robbery and embezzlement," with which said defendant charged the maker, etc., tenders an issue to which is applicable an instruction that if the defendant took the note under an agreement, express or implied, that he would not prosecute the maker for such crime, and without any other consideration, the jury should find for the plaintiff.

From the Vigo Circuit Court.

C. F. McNutt, J. G. McNutt and B. E. Rhoads, for appellant.
S. C. Davis, S. B. Davis, I. N. Pierce and T. W. Harper, for appellees.

BEST, C.—The appellees brought this action against the appellant to procure the cancellation of a note of \$400 made by them to him.

The complaint consisted of two paragraphs. The first alleged that the note was executed without any consideration. The second alleged, in substance, that the note was executed under duress, and in compromise of a threatened criminal prosecution.

An answer in denial and a counter-claim, seeking to recover the amount of the note, were filed. An answer in denial of the counter-claim completed the issues. These were submitted to a jury, and a verdict was returned for the appellees. A motion for a new trial was overruled, and judgment was rendered upon the verdict. The appellant assigns as error that the complaint does not state facts sufficient to constitute a cause of action, and that the court erred in overruling the motion for a new trial.

The appellant's argument in support of the first assignment is directed exclusively against the second paragraph of the complaint. A single paragraph can not thus be attacked. Such an assignment questions the entire complaint, and if any paragraph is sufficient such an assignment can not be sustained. *McCallister v. Mount*, 73 Ind. 559.

The first paragraph of this complaint was unquestionably good, and, therefore, this assignment can not be sustained.

The motion for a new trial embraced several causes. Those relied upon by the appellant for a reversal are, that the ver-

dict is not sustained by the evidence, and that the court erred in giving and in refusing to give numerous instructions.

The appellees insist that the evidence is not in the record, and in its absence neither ground of the motion for a new trial presents any question. An examination of the record leads us to the conclusion that all of the evidence, at least, is not in the record, and, therefore, we can not consider its sufficiency or the instructions given and refused, as though the record contained the evidence.

The second paragraph of the complaint avers that John S. Turner is principal in the note sought to be cancelled, and when he executed it he endorsed to the appellant four other notes to be held by him as collateral security until he, Turner, obtained some one to sign the note in dispute as surety. In support of this averment these notes were read in evidence, as appears from the bill of exceptions. It recites that the "plaintiff offered and read in evidence the four notes turned over to J. W. Stout by John S. Turner, and the assignments thereon, which are in words and figures as follows, to wit." Then follows a blank page where these notes should have been copied, but they are not in the record. It thus affirmatively appears that the record does not contain all the evidence, notwithstanding the general statement to the contrary with which the bill of exceptions concludes. *Merrifield v. Weston*, 68 Ind. 70; *Powers v. Evans*, 72 Ind. 23.

In this condition of the evidence we can not pass upon the sufficiency of the evidence. *Huston v. McCloskey*, 76 Ind. 38.

In the absence of the evidence, instructions refused will be deemed properly refused because not applicable to the case made by the evidence. *Blizzard v. Bross*, 56 Ind. 74; *Shafer v. Stinson*, 76 Ind. 374. Nor will instructions given, in the absence of the evidence, work a reversal of the judgment unless erroneous under any supposable state of facts. *Byram v. Galbraith*, 75 Ind. 134; *Northwestern Mut. Life Ins. Co. v. Heimann*, 93 Ind. 24.

It is not insisted that any of the instructions given, except

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the eleventh, is within this rule, and an examination of them leads us to the conclusion that none of them are erroneous upon any and every supposable state of the evidence.

The eleventh instruction informed the jury that if the appellant took the note from Turner under an agreement, express or implied, that he, the defendant, would not prosecute Turner for the crime of robbery, larceny or embezzlement, and without any other consideration, they should find for the Turners.

The appellant does not insist that such fact would not vitiate the note, but it is insisted that such defence was not within the issues. We think otherwise. The second paragraph of the complaint, after averring the plaintiff John S. Turner's imprisonment by the defendant, thus proceeds: "That said defendant then demanded of said John the payment of \$1,000, and informed him, said John, that he could not get out of said cellar until he would pay or secure to defendant said sum, which defendant said he would receive and accept in full satisfaction and compromise of said robbery and crime; that said John then and there denied the commission of any robbery or crime, or that he ever took one cent of defendant's money; but being pressed and threatened as aforesaid, and being put in great fear of bodily harm by the defendant as aforesaid, said John did then and there assign to said defendant \$400 in value of good and solvent notes on third persons until he could get some one to go on his note as security for the said sum of \$400, which said defendant then and there agreed to take and receive in full satisfaction and compensation of the crime of larceny, robbery and embezzlement, with which defendant charged said John; that thereupon said John executed said note," etc.

These averments were sufficiently comprehensible to admit proof that such vicious agreement was the sole consideration of said note. If so, the instruction was proper. This disposes of all the questions in the record. We will add that we have examined the evidence, which is in the

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record, and are entirely satisfied with the conclusion reached. For the reasons given, we think that no error appears in the record, and that the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the appellant's costs.

Filed Jan. 9, 1885; petition for a rehearing overruled Sept. 22, 1885.

No. 10,838.

SOICE, EXECUTOR, v. HUFF, ADMINISTRATOR.

- PLEADING.—*Complaint to Satisfy Mortgage and Judgment.—Tender.—Supreme Court.*—A complaint to secure the satisfaction of a mortgage and a judgment, alleging a tender and payment into court of "the full amount due on the judgment and the mortgage," but not stating the rate of interest on the judgment, or any other fact showing that the amount tendered was not sufficient, is good upon objection for the first time in the Supreme Court.

From the Marshall Circuit Court.

A. C. Capron and C. Richardson, for appellant.

H. Corbin, for appellee.

BLACK, C.—Francesca Schilt, administratrix of the estate of Christian Schilt, deceased, sued Christian Seiler. Pending the suit in the court below, said Francesca died, and William Huff having been appointed administrator *de bonis non* of said estate, the name of said successor was substituted, and the suit was continued by him. Issues were formed, which were tried by the court, the finding and the judgment being in favor of the plaintiff. The defendant's motion for a new trial was overruled. The defendant appealed. Before the submission of the cause in this court, the appellant died, testate, and the name of John Soice, as executor of his will, was substituted.

The specifications in the assignment of errors, discussed by

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counsel, are that the complaint did not state facts sufficient to constitute a cause of action, and that the court erred in overruling the motion for a new trial.

By the complaint the administratrix of the estate of said Schilt, deceased, sought to have a certain judgment and a certain mortgage adjudged satisfied, as having been paid by the plaintiff. It is insisted that the complaint failed to show the full payment of the judgment and the mortgage.

The mortgage was executed by one Miller to the defendant Seiler, on the 7th day of August, 1871, upon certain real estate in Marshall county, to secure the payment of a note of the same date made by the mortgagor to the mortgagee, for \$400, due in one year after date, with ten per cent. interest. The mortgage had been recorded, and the mortgaged property had been purchased by the plaintiff's intestate from said mortgagor. It was alleged, that by reason of said mortgagor's insolvency, the plaintiff was compelled to and did pay the mortgage, as afterward in the complaint set forth. The judgment was alleged to be one rendered in the court below against said estate after the plaintiff became administratrix thereof, being a judgment in favor of the defendant, said Seiler, for \$893.02, rendered March 21st, 1876. It was alleged that the plaintiff had paid out of the assets belonging to said estate, to apply on said claims, at dates designated, certain specified amounts, aggregating \$1,400. It was then alleged that, on the 25th of February, 1881, the plaintiff tendered to the defendant a certain amount stated, and demanded that the judgment and the mortgage be satisfied by him, he being, at the time of the making of said payments and said tender, the owner of said mortgage and of said judgment. The refusal of the defendant and the payment of the tendered money into court were alleged, and it was averred that the sum so tendered was the full amount due on said judgment and mortgage at the time of the tender.

The complaint did not show a particular application of any payment, and, therefore, it was not sufficient unless it showed

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the full payment of both debts. If, as contended by the appellant, the complaint did not show such full payment except by counting interest upon the mortgage debt by the rule laid down in *Burns v. Anderson*, 68 Ind. 202 (34 Am. R. 250), it could not be regarded as stating sufficient ground for decreeing the satisfaction of the judgment and the mortgage; for that case was overruled in *Shaw v. Rigby*, 84 Ind. 375 (43 Am. R. 96). See, also, *Hume v. Mazelin*, 84 Ind. 574; *Holmes v. Boyd*, 90 Ind. 332; *Kerr v. Haverstick*, 94 Ind. 178. The mortgage creditor was entitled to interest at the rate of ten per cent. per annum, for the period during which such debt, or any part of it, remained unpaid after the maturity of the mortgage note, as well as for the period between its execution and its maturity.

But the complaint did not state the rate of interest on the judgment or show upon what cause of action the judgment was rendered. The judgment bore interest from the time it was entered on the proper record. 2 R. S. 1876, p. 517, section 67. If it was upon a contract which bore interest at a certain rate expressed in the contract, the judgment would bear interest at the same rate, not exceeding ten per cent. if the contract was not made before the taking effect of the act of February 5th, 1873, 1 R. S. 1876, p. 600, and not exceeding six per cent. if controlled by section 3 of the act of March 7th, 1861, 1 R. S. 1876, p. 600.

The judgment might have borne such a low rate of interest that the payments particularly alleged, together with the tender, would have been sufficient to satisfy the judgment and the mortgage; and it was alleged that the sum so tendered was the full amount due on the judgment and the mortgage at the time of the tender.

Upon an objection first made in this court, we can not say that the complaint was insufficient as suggested by counsel, and we make no examination of the pleading in any other respect.

The causes assigned in the motion for a new trial were that

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the finding was not sustained by the evidence, and that it was contrary to law. There is a bill of exceptions which formally professes to contain all the evidence; but it appears therefrom that certain written evidence was introduced which is not in the record, the clerk stating in parenthesis that it was not on file.

As the evidence is not all before us we can not say that there was error in overruling the motion for a new trial.

There is no available error in the record.

PER CURIAM.—It is ordered, on the foregoing opinion, that the judgment be affirmed, at the appellant's costs.

Filed March 14, 1885; petition for a rehearing overruled Sept. 22, 1885.

No. 12,417.

TURNER v. THE STATE.

CRIMINAL LAW.—*Indictment.—Description of Property.*—The property which the indictment alleges was stolen by the defendant is thus described: "One book, of the value of six dollars, the personal property of Levi W. Welker."

Held, that this was a sufficient description.

SAME.—*Evidence.—Fabrication of Evidence.*—It is a familiar principle that the fabrication of evidence is a criminative circumstance against an accused person, and evidence tending to show that his account of the manner in which he obtained possession of the stolen property was fabricated, is competent.

SAME.—*Rule where Two Crimes are Connected.*—Although the general rule is that one crime can not be proved in order to establish another, yet, where the two are connected, it is competent to prove both.

SAME.—*Instructions.*—The following instruction is not erroneous: "The rule of law which clothes every person with the presumption of innocence, and imposes upon the State the burden of establishing his guilt beyond a reasonable doubt, is not intended to aid one who is in fact guilty of a crime to escape, but is a humane provision of law, intended to guard against the danger of any innocent person being unjustly punished."

SAME.—*Repeating Instructions.*—Where an instruction is given by the court,

102	425
186	396
102	425
141	37
143	688
102	425
149	642
102	425
el65	567
102	425
p169	434
170	632

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it is not error to refuse an instruction asked by the defendant asserting the same rule of law.

SAME.—New Trial.—Newly Discovered Evidence.—Where it appears that the newly discovered evidence will not change the result, it is not error to refuse a new trial.

From the Noble Circuit Court.

F. Prickett, for appellant.

F. T. Hord, Attorney General, and *W. B. Hord*, for the State.

ELLIOTT, J.—The indictment upon which the appellant was convicted charges him with stealing "one book, of the value of six dollars, the personal property of Levi W. Welker." We think that the description of the property stolen is sufficient. The case of *State v. Logan*, 1 Mo. 532, is exactly in point, and the principle upon which the decision rests is decided in many cases. *State v. King*, 31 La. Ann. 179; *State v. Carter*, 33 La. Ann. 1214; 2 Bishop Crim. Proc., section 700, and authorities cited. The books are full of cases in which it was held that such descriptions as "one horse," "one cow," "one hog," are sufficient, and there is no reason why a different rule should apply here.

The defendant testified as a witness in his own behalf, and in the course of his testimony stated that he was a book agent, representing a Philadelphia firm; that when he left Fort Wayne for Auburn, he had in his possession several books, among others Jones on Chattel Mortgages; that he had purchased it at Philadelphia, and he made some statements as to his business at Auburn. The State was permitted, in giving evidence in reply, to prove by Mr. Peterson that the book was stolen from him, and that the one hundredth page containing his name was torn out. The appellant complains of the admission of this testimony. The testimony objected to contradicted the appellant upon a material point, or rather upon two material points, for it tended very strongly to show that his account of the place and manner in which he got the book alleged to have been stolen was

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not true, and also flatly contradicted his statement as to where he obtained Jones on Chattel Mortgages. It is an elementary principle of criminal law that the fabrication of evidence is a criminative circumstance tending to establish guilt, and this evidence very strongly tended to show that Turner's statement as to how and where he procured the books found in his possession, including the stolen one, was fabricated. The testimony went to the whole theory upon which he attempted to account for his possession of the books, and it was unquestionably competent for the State to show that his statements were false and his theory without foundation. Where the specific property charged to be stolen is found in the possession of the accused, in connection with other property, and the possession of the property is attempted to be accounted for, it is proper for the State to show that the account given was untrue. The authorities, indeed, go farther, for it is held that in cases of larceny it is competent to show the possession of other stolen property. *Webb v. State*, 8 Texas Ap. 115; 3 Greenl. Ev., section 31.

The general rule is that one crime can not be proved by establishing another, but to this general rule there are many exceptions. A notable exception is where the two crimes are connected, and that is the case here. *Hope v. People*, 83 N. Y. 418 (38 Am. R. 460); *State v. Nugent*, 71 Mo. 136; Wharton Crim. Ev. (9th ed.), section 32, n. 1. In this instance the two matters were closely blended, and the testimony upon which the defence mainly rested was addressed to both, so that they can not be separated.

It is contended that the court erred in giving the jury this instruction: "The rule of law which clothes every person accused of crime with the presumption of innocence, and imposes upon the State the burden of establishing his guilt beyond a reasonable doubt, is not intended to aid any one who is in fact guilty of crime to escape, but is a humane provision of law, intended, so far as human agencies can, to guard against the danger of any innocent person being un-

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justly punished." We perceive no error in this instruction. It can not be justly said of any rule of law that it is intended to aid the guilty to escape punishment, and the court did not do wrong in affirming of the presumption of innocence that attends all persons accused of crime, that it is not intended to aid those who are in fact guilty of crime to escape. Laws are intended to secure the punishment of the guilty and to guard the innocent, but not to shield the guilty, and it is not error to affirm this of all the rules of law.

The second instruction asked by the appellant was embraced in the third, given by the court, and there was no error in refusing to repeat what had been said to the jury. *Goodwin v. State*, 96 Ind. 550; *Union, etc., Co. v. Buchanan*, 100 Ind. 63. There is no assumption of the facts in any of the instructions given by the court.

The affidavit of appellant filed in support of the motion for a new trial is contradictory, and fails to show diligence, but, waiving this point, it does not appear that the book the appellant is charged with stealing, namely, "Drake on Attachment," was the same book which the affiant saw in the possession of the accused in Fort Wayne, and it is evident that this evidence would not change the result. *Hines v. Driver*, 100 Ind. 315.

Judgment affirmed.

Filed June 26, 1885.

 No. 12,246.

HUNTER v. THE STATE.

CRIMINAL LAW.—*Bill of Exceptions.*—*Time of Filing.*—*Practice.*—In criminal prosecutions bills of exceptions must be filed at the time of the trial, or within such time as the court may then allow. Section 1847, R. S. 1881.

SAME.—*Justice of the Peace.*—*Clerical Error in Transcript.*—Upon appeal to the circuit court from a conviction before a justice of the peace, a mere clerical error in copying the affidavit into the transcript, when shown to

109	428
138	13
108	428
141	596
102	428
152	297
102	428
162	177

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be such by the original papers sent up as required by statute, is not available to the defendant.

SAME.—Affidavit.—Notary Public.—An affidavit before a justice of the peace charging felony or misdemeanor need not necessarily be sworn to before the justice, but it may be sworn to before a notary public. Sections 5964 and 6010; R. S. 1881.

From the Warren Circuit Court.

J. McCabe and E. F. McCabe, for appellant.

F. T. Hord, Attorney General, *W. B. Hord* and *J. G. Pearson*, for the State.

ZOLLARS, J.—Upon an affidavit charging appellant with having sold intoxicating liquors on Sunday, in violation of section 2098, R. S. 1881, he was convicted before a justice of the peace, and again on appeal to the circuit court. Over a motion for a new trial in the latter court, he was sentenced to pay a fine and costs.

The first question made here by his counsel is that the motion for a new trial should have been granted, because of the insufficiency and lack of evidence. This is met by the attorney general with the contention that the evidence is not before us, because there is no bill of exceptions embodying it properly in the record. This contention is supported by the record.

The motion for a new trial was overruled, and final judgment rendered on the 13th day of January, 1885. No bill of exceptions was filed at that time, nor was time asked or granted within which to file a bill. On the 23d day of the same month replevin bail was entered, and sixty days granted by the court within which to file a bill of exceptions. A bill, filed within that time, is copied into the transcript by the clerk, but it is clearly not a part of the record, and can not be so regarded. The trial ended with the overruling of the motion for a new trial and the final judgment on the 13th, after which time the court had no authority to grant or fix any time for the filing of a bill of exceptions. In criminal prosecutions bills of exceptions must be filed at the time of

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the trial, or within such time as the court may then allow. R. S. 1881, section 1847; *Hunter v. State*, 101 Ind. 406.

The evidence is not in the record, and hence none of the questions dependent upon it can be considered.

Two questions are made as to the sufficiency of the affidavit upon which appellant was tried. The first is that there is no sufficient statement therein of the amount paid for the liquor. In the transcript from the justice's court, a copy of the affidavit is set out, and in this it is stated that the liquor was sold to one Miner "at and for the price of seventy-five."

The statute requires (R. S. 1881, section 1645), that on such appeals, the justice shall send up the original papers. This seems to have been done in this case. In the record here the clerk has set out the affidavit in full, and it contains the statement that the amount for which the liquor was sold was seventy-five cents. It is thus made apparent that the statement in the justice's transcript was a mere clerical error in copying the affidavit.

The second objection urged to the affidavit is, that it appears to have been sworn to before a notary public, and not before the justice of the peace. The statute provides that any justice, on complaint made on oath before him, charging any person with the commission of any felony or misdemeanor, shall issue his warrant, etc. R. S. 1881, section 1625. This requires that the complaint shall be made on oath, but it would be a narrow and unreasonable construction to hold that it requires that the oath must be administered by the justice who is to hear the case. It was surely not the intention of the law-makers that the justice might not proceed upon such a complaint, sworn to before the clerk of the court, or another justice. Nor could it have been intended that such a complaint might not be sworn to before a notary public. It is provided in two different sections of the statute that notaries public shall have authority to administer oaths generally, pertaining to all matters where an oath is required. R. S. 1881, sections 5964, 6010. The au-

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thority conferred by these sections is clearly broad enough to cover cases like the one before us.

The judgment is affirmed, with costs.

Filed May 25, 1885; petition for a rehearing overruled Sept. 16, 1885.

No. 11,275.

ATKINSON v. MOTT ET AL.

TRESPASS.—Animals.—Order by County Commissioners Permitting them to Run at Large.—Evidence.—The making of an order by the board of commissioners permitting domestic animals to run at large, as contemplated by section 4835, R. S. 1881, must be shown as any other fact, and in the absence of such showing it will be assumed that no such order has been made.

SAME.—Action for Damages.—Pleading.—Fences.—Negligence.—Where there is no such order, it is not necessary, in an action to recover for injuries done by trespassing animals, to allege or prove the existence of a lawful fence, nor to allege that the defendant was negligent and the plaintiff without fault, nor to allege that the damages are due and unpaid.

SAME.—Husband and Wife.—Parties.—Where such an action is brought by a married woman for injuries to her property, the husband may be joined as plaintiff, although he is not a necessary party.

SAME.—Recovery by One Joint Owner.—Res Adjudicata.—In such case, if the wife is a joint owner with her co-plaintiff, a recovery by her for the entire damage done would bar another action by her or her husband for the same subject-matter.

PRACTICE.—Defect of Parties.—Waiver.—An objection on account of a defect of parties, if not taken by demurrer or answer, as provided by sections 339 and 343, R. S. 1881, is waived.

From the Benton Circuit Court.

M. H. Walker, I. H. Phares, J. R. Coffroth and T. A. Stuart, for appellant.

D. Smith and G. H. Gray, for appellees.

BLACK, C.—The appellees, Prudence Mott and her husband, sued the appellant to recover damages for injuries to the property of said Prudence, done by trespassing cattle of

108	431
130	292
108	431
142	557
102	431
148	235

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the appellant. The complaint consisted of five paragraphs, which were alike, except as to the times at which the cattle were alleged to have entered, and as to the property injured, and except that the first four paragraphs charged the breaking and entering into land in the occupation and lawful possession of said Prudence, while in the fifth it was alleged that the cattle broke and entered into certain other land owned by said Prudence in fee simple. In each paragraph the cattle were alleged to have been owned and controlled by the defendant, and to have entered the land so owned or occupied by breaking through a partition or inside fence, which separated the plaintiffs' premises from adjoining land on which the defendant was pasturing said cattle. It was in each paragraph alleged that "the defendant wrongfully, carelessly and negligently suffered and permitted his said cattle to break," etc.

The defendant's demurrer to each paragraph of the complaint for want of sufficient facts was overruled. There was an answer in denial. A jury returned a verdict for the plaintiff. The defendant's motion for a new trial was overruled, and judgment was rendered on the verdict.

The statute of 1877, section 4835, R. S. 1881, provides: "If any domestic animal break into an inclosure or wander upon the lands of another, the person injured thereby shall recover the amount of damage done, provided, that in townships where, by order of the board of county commissioners, said domestic animals are permitted to run at large, it shall appear that the fence through which said animal broke was lawful; but where such animal is not permitted to graze upon the uninclosed commons, it shall not be necessary to allege or prove the existence of a lawful fence in order to recover for the damage done."

The making of the order of the board of county commissioners, to which reference is made in this statute, is a matter of which courts, in such cases, will not take notice, unless it be shown as other facts must be shown; and in the absence of any averment that such an order had been made, it must

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be assumed, for the purposes of the ruling upon the demurrer, that there was no such order, and that, as at common law, the owner of the trespassing cattle was responsible to the person injured.

Another section of the statute (section 4848, R. S. 1881,) provides what shall be a lawful partition fence; and if it had appeared that such an order had been made by the board of county commissioners, it would have been necessary for the plaintiff to show that the cattle broke through a lawful fence, or that they broke through a fence defective through the failure of the defendant to perform his contract duty to the plaintiff. *Hinshaw v. Gilpin*, 64 Ind. 116; *Baynes v. Chastain*, 68 Ind. 376. But as it did not appear that such an order had been made by said board, the express provision of the statute, like the common law rule, made it unnecessary to allege the existence of a lawful fence in order to recover for the damage done. The cattle were trespassers, and they would have been such though it had appeared that their owner, the appellant, was not negligent, but used care and diligence to keep them upon his own land, or to confine them within his own inclosure. *Pittsburgh, etc., R. W. Co. v. Stuart*, 71 Ind. 500.

What was said in the complaint about negligence on the part of the defendant was surplusage, and, therefore, it was not necessary, as contended by the appellant, to allege that the plaintiff was without fault. See *Clark v. Stipp*, 75 Ind. 114.

While the husband was not a necessary party (R. S. 1881, section 254), he was not improperly joined as a plaintiff.

In such an action as this the complaint need not allege that the damages are due and unpaid.

We have answered the objections urged against the complaint, and we find no error in the overruling of the demurrer.

There was evidence that a portion of the land on which the cattle trespassed, at various times from October, 1881, to

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July, 1882, was occupied by the plaintiffs under a lease, the date of which was not shown. There was some conflict in the testimony as to whether this was a lease to the plaintiff Prudence Mott alone, or to her and her husband and co-plaintiff. The evidence showed that the cattle injured crops growing on this land, and ate and destroyed grain stored thereon raised by the labor of said husband and his boys.

The appellant presented certain interrogatories and certain instructions, which the court rejected, and he excepted to certain instructions given. The question which the appellant thus sought to raise was whether a recovery in this action for the injury so done on said leased land should be defeated by the facts, if found, that said lease was made to said Prudence and her said husband, and that the property so injured was owned by them jointly.

We think that the court did not err in deciding this question against the appellant.

A defect of parties, if apparent upon the face of the complaint, must be raised by demurrer assigning that specific cause; if not so apparent, it must be presented by answer; and if such objection be not taken by demurrer or answer, it is waived. R. S. 1881, sections 339, 343; *Thomas v. Wood*, 61 Ind. 132.

If the plaintiff Prudence was a joint owner with her co-plaintiff, a recovery by her in this action for the entire damage done by the trespassing cattle would bar another action by her or her husband, or both, for the same subject-matter.

We find no error in the record.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at the costs of the appellant.

Filed April 2, 1885; petition for a rehearing overruled Sept. 22, 1885.

The Crawfordsville and Darlington T. P. Co. v. The State, *ex rel.* Howard.

No. 12,398.

THE CRAWFORDSVILLE AND DARLINGTON TURNPIKE COMPANY v. THE STATE, *EX REL.* HOWARD, PROSECUTING ATTORNEY.

CORPORATION.—*Turnpike Company.—Extensions.—Void Consolidation.—Effect as to Rights of Company.*—Where two turnpike companies, under an attempted consolidation, are controlled by a common management for many years, without objection, and then, by legal proceedings, such consolidation is declared void, each company may assume control of its original road and franchises, and also of an extension of such original road, for the construction of which articles of association and subscriptions to capital stock were made by the individual company, although the right of way for such extension was petitioned for by, and granted to, the consolidated company.

From the Montgomery Circuit Court.

G. W. Paul, J. E. Humphries, P. S. Kennedy and S. C. Kennedy, for appellant.

J. H. Burford, W. H. Thompson and W. B. Herod, for appellee.

HOWK, J.—This was an information in the nature of a *quo warranto*, filed by the appellee's relator, Frank M. Howard, Esq., as the prosecuting attorney of the twenty-second judicial circuit, against the appellant the Crawfordsville and Darlington Turnpike Company, as sole defendant. The cause was put at issue and tried by the court, and, at the appellant's request, the court made a special finding of the facts, and stated its conclusion of law thereon, in favor of the appellee's relator. Over the appellant's exceptions to the conclusion of law, the court rendered a judgment and decree in favor of appellee's relator, as prayed for in his information.

In this court, the appellant's counsel first complain, in argument, of the alleged error of the trial court in its conclusion of law upon its special finding of facts.

The facts found by the court were substantially as follows: The Crawfordsville and Darlington Turnpike Company was, at the commencement of this suit, a duly organized turn-

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pike company, and doing business as such, and was incorporated in Montgomery county, on the 31st day of August, 1865. The appellant was incorporated for the purpose of constructing, owning and operating a turnpike and gravel road over and on the following line of public highway, to wit: Beginning at the east corporation line of the city of Crawfordsville, on Market street, and running thence east and northerly to the eastern terminus of the Crawfordsville and Shannondale turnpike, and running thence north and easterly over the old highway for a distance of about five miles, on the road leading to the town of Darlington, in such county. Such line of road is the only line of road mentioned or described in the original articles of incorporation of the appellant. On the 19th day of October, 1866, the appellant pretended to organize a consolidated turnpike company, by consolidating with the Crawfordsville and Shannondale Turnpike Company, a gravel road corporation duly and regularly organized, and owning and operating a distinct line of road, in such county, whose road connected with appellant's road. Such intended consolidated corporation assumed the name and style of the "Crawfordsville and Shannondale Consolidated Turnpike Company," and, under that name, operated such lines of turnpike and gravel road until the 16th day of November, 1878, at which time such last named company transferred all its rights, properties and franchises to a new and separate organization, styling itself the "Crawfordsville and Eastern Turnpike Company."

Such attempted turnpike company, the Crawfordsville and Eastern Turnpike Company, operated such lines of road as a turnpike, and collected tolls from travellers over and upon the line of road known as the Crawfordsville and Darlington turnpike, until the month of August, 1882, when it abandoned its new organization and style, and assumed all its rights in and to the Crawfordsville and Darlington turnpike, the road and highway described in the original articles of association of the appellant corporation. From October 19th,

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1866, to August, 1882, the appellant did not act as a corporation. On the 6th day of September, 1867, after the appellant had transferred its property and rights to the attempted consolidated turnpike company, and after the appellant had ceased to act as a turnpike company, the Crawfordsville, Shannondale and Darlington Consolidated Turnpike Company, by that name, presented its petition in writing to the board of commissioners of Montgomery county, praying such board to grant the right of way to such company to construct a branch extension of its road on and over the public highway, as follows, to wit: Beginning at the center of the Crawfordsville and Darlington turnpike, on the S. E. corner of the W. half of the S. E. quarter of section 21, township 19 north, of range 4 west, thence running west on the section line one-half mile, thence over the highway known as the Hill's Factory road until it intersected the old Spader's mill road leading to Crawfordsville, and thence over such road, as then travelled, to its intersection with the Crawfordsville, Shannondale and Darlington turnpike road. At the September term, 1867, of such board of commissioners, the following order was made on such petition, to wit: "And the board, after being advised, grants the right of way to said company over the road described in such petition, upon the condition that such company shall execute a bond, in a penalty of one thousand dollars, payable to the board of commissioners of Montgomery county, Indiana, conditioned for the keeping in good repair, and in safe and passable condition, the road described in such petition, during the whole time such company may be constructing a turnpike thereon."

The foregoing grant is the only grant of the right of way over the line of road therein described ever made by the board of commissioners of Montgomery county to any turnpike company or corporation, prior to the commencement of this suit. There never was any such corporation, turnpike or gravel road company, as that named in the aforesaid petition. At the time such grant was made the appellant cor-

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poration was not operating any line of road, collecting any tolls, or doing any other act as a turnpike company. There was a line of gravel road constructed on and over the line of highway described in such petition, which was constructed by the pretended Crawfordsville and Shannondale Consolidated Turnpike Company, in the year 1868. The appellant corporation, as a separate and individual organization, never made any claim to, nor pretended to own or operate, such line of road described in such grant, until August, 1882. The line of road described in such petition and grant was a public highway, and had so been for over twenty years prior to such grant, and had been so used ever since. The appellant corporation, on or about the 20th day of August, 1882, took possession of such highway and turnpike, and assumed control thereof, and since that date, and until the institution of this suit, had been collecting tolls from travellers and citizens of such county who travelled thereon, had maintained toll-gates across and upon such highway and turnpike, and had exercised all the rights of a gravel road company on and over such highway and turnpike, under its original articles of association. Such road had been a public highway continuously for over fifty years, and was largely travelled by persons going to and from the city of Crawfordsville, in Montgomery county.

Such line of road and public highway was not included in the original articles of association of the appellant. The appellant never at any time obtained from the board of commissioners of such county a grant of the right to construct a toll-road or turnpike upon such highway, other than that set out above. Such toll-gates are obstructions to such public highway, and to the free use thereof and travel thereon. The Crawfordsville and Darlington Turnpike Company and the Crawfordsville and Shannondale Turnpike Company built their roads, as described in their original articles of association, and, on the 19th day of November, 1866, the two corporations attempted to consolidate under the name of the

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Crawfordsville and Shannondale Consolidated Turnpike Company, and such consolidated company took possession of such roads, and held and operated them until the 18th day of December, 1878, when such consolidated company joined with the Crawfordsville and Fredericksburg Turnpike Company and attempted to consolidate the two companies under the name of the Crawfordsville and Eastern Turnpike Company, and such company operated such roads until August, 1882, when the consolidation was abandoned, and the original corporations elected officers for the old corporations and took possession of such roads. The Crawfordsville and Shannondale Consolidated Turnpike Company, claiming the right to such highway under such grant, took possession thereof and constructed a turnpike thereon and operated the same. The grant as found herein was petitioned for by V. Q. Irwin, Esq., as president of the Crawfordsville and Shannondale Consolidated Turnpike Company. On the 6th day of September, 1867, the appellant corporation, by its stockholders, entered into the following articles of association, to wit:

“Articles of association of the Crawfordsville and Darlington Turnpike Company, for the extension of such turnpike as herein below specified. The above named company covenants and agrees to add to and extend the Crawfordsville and Darlington Turnpike as follows, to wit: Beginning in the center of the Darlington turnpike, at the southeast corner of the west half of the southeast quarter of section 21, township 19 north, of range 4 west; thence running west on the section line one-half mile; thence over the highway known as the Hill’s Factory road until it intersects the old Spader’s mill road leading to Crawfordsville; thence over said road, as now travelled, to where it intersects the Crawfordsville, Shannondale and Darlington turnpike road; that in the construction and management of such extension, the above named company will be subject to all the rules and regulations, rights and obligations, claimed and assumed in the above articles of association; that the route of such pro-

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posed extension of said turnpike is about two and one-half miles in length; that in the construction and management of said extension we will employ a capital stock of \$5,000, which amount we hereby add to above amount of capital stock heretofore subscribed, divided into two hundred shares of \$25 for each share of stock, to be paid and payable as prescribed in above original articles of association." (These articles of association for the proposed extension of appellant's turnpike were subscribed by five persons, as stockholders, all residing at Crawfordsville and each subscribing for forty shares of stock. We omit their names, etc.)

Upon the foregoing facts, the court stated the following conclusions of law:

"1. Defendant has no right to maintain the toll-gate on or across the Hill's Factory road, described in the complaint.

"2. The plaintiff is entitled to an injunction, as prayed for in the complaint."

From the court's special finding of facts, the substance of which we have given, it is manifest that this cause, like the cases of *State, ex rel., v. Crawfordsville and Shannondale Turnpike Co.*, ante, p. 283, and *State, ex rel., v. Crawfordsville and Darlington Turnpike Co.*, post, p. 600, had its origin in the opinion of this court in *State, ex rel., v. Beck*, 81 Ind. 500.

In the case last cited it was substantially held by this court that the attempted consolidation of certain turnpike corporations, theretofore lawfully organized and existing in Montgomery county, and the attempted formation of a consolidated corporation under an assumed corporate name, were not authorized by any statute of this State, and were therefore void. The consolidation seems to have been attempted solely for the purpose of placing the control and management of the roads of the respective corporations under one common board of directors, with a single set of officers. There does not seem to have been any intention, on the part of either of the original corporations or of the stockholders thereof, to abandon

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their corporate property or to surrender their corporate rights and franchises. When the opinion of this court in *State, ex rel., v. Beck, supra*, was announced, of course the attempted organization of a consolidated corporation ceased and was at once abandoned. Each of the original corporations, parties to such attempted consolidation, with the consent of the others and of the stockholders thereof respectively, at once assumed the possession and control of its turnpike and other property, which, at heavy cost, it had constructed many years before, and, also, assumed to exercise over such road and property its rights, privileges and franchises, under the law, as a turnpike company. This, the trial court decided, each of the original corporations, after the termination of the attempted consolidation, had the right to do, and, upon appeal, this court at its present term affirmed such decisions, in the two cases above cited. These decisions, we think, were manifestly just and right, and in harmony with our previous cases involving similar questions. *Moore v. State, ex rel.*, 71 Ind. 478; *Smelser v. Wayne, etc., Turnpike Co.*, 82 Ind. 417; *State, ex rel., v. St. Paul, etc., Turnpike Co.*, 92 Ind. 42.

In the case at bar the trial court found as a fact that the appellant, at the commencement of this suit, was a duly organized turnpike company, and doing business as such, in Montgomery county, and that it was in the possession of, and exercising corporate power over, the extension of its road in controversy in this action. But the court seems to have rested its conclusions of law and its judgment against the appellant upon the following facts: 1. That the extension of its turnpike, now in controversy, was not mentioned or described in the original articles of association of the appellant corporation; and, 2. That the petition to the board of county commissioners for the right of way over the public highway, on and over which such extension was constructed, was presented in the assumed name of the attempted consolidated company by its president, and the grant of such right of way was in

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fact made by such county board to such attempted consolidated company, and *not* to the appellant corporation.

We are of opinion, however, that these facts are insufficient, and especially so when considered in conjunction with other facts found, to authorize the court's conclusions of law and judgment. For, although the court found that the right of way over the highway for the proposed extension of turnpike, was granted by the county board to the attempted consolidated company by its assumed name; yet it was also found that the appellant corporation alone made the necessary articles of association, and procured the requisite subscription to its capital stock for the construction of the extension of turnpike over such highway now in controversy, and that such extension was in fact an extension of the turnpike owned and held by the appellant alone before the consolidation was attempted. It seems to us, that when the attempted consolidation was abandoned, the appellant had the right, upon the facts found by the court, to take possession and control, not alone of its original road, but also of the extension of such road now in controversy, and to exercise over both the original road and its extension all the rights, privileges and franchises of a turnpike corporation, under the law. This is what the appellant was doing when this suit was commenced; and we are unable to see wherein or how the State has been prejudiced or injured by the acts or conduct of the appellant, in the premises. For more than one year prior to the institution of this suit the appellant had been in the exclusive possession and control of the extension of its road now in controversy, and if, in the meantime, the rights of the public or the interests of the State have suffered in any manner, by or through the acts of the appellant, the facts are not found by the court.

We conclude, therefore, that the trial court has erred in its conclusions of law, and that, in lieu thereof, it ought to have found for the appellant.

The judgment is reversed, and the cause is remanded with

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instructions to the court to set aside its conclusions of law and, in their stead, to state its conclusion of law in accordance with this opinion, and render judgment accordingly.

Filed June 26, 1885.

No. 12,186.

AVERY ET AL. v. DOUGHERTY.

- PLEADING.—*Exhibits.***—Where a written instrument is the foundation of a pleading and is made an exhibit, its statements will control the allegations of the pleading.
- CONTRACT.—*Descriptive Words.***—Mere descriptive words appended to the name of a party to a contract are, as a general rule, regarded as a description of the person who signs the instrument, but, where the instrument on its face shows that the words are not simply *descriptio personæ*, they will be given their proper force and effect.
- SAME.—*Signing by Agent.***—The lease on which the defence in this case is founded recites that "The said Marshall, agent as aforesaid, has rented to Madison and Monroe Avery," and this recital shows that Marshall was the agent of the lessor, and as such agent executed the lease.
- SET-OFF.—*Tort.*—*Landlord and Tenant.***—The general rule is that a tort can not constitute a defence by way of set-off or counter-claim, and a mere trespass by the landlord can not be set off against an action to recover rent.
- LEASE.—*Covenant for Quiet Enjoyment.***—Where there is a demise of land for a term certain, the law imports into the lease a covenant for quiet enjoyment.
- SAME.—*Breach of Covenant.*—*What Constitutes.***—A mere fugitive trespass by the landlord will not constitute a breach of the covenant for quiet enjoyment, but an entry by the landlord, under a claim or assertion of title, will constitute a breach of the covenant.
- PLEADING.—*Evidence.***—There is a distinction between inferences in matters of pleading and evidence; in pleading, facts must be positively alleged and nothing except matters of law left to inference, while in considering evidence inferences of fact may be made by the triers of the case.

From the Morgan Circuit Court.

J. V. Mitchell and J. F. Cox, for appellants.

J. H. Jordan and O. Matthews, for appellee.

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143	621
143	646
102	443
145	529
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149	14
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1155	598
155	587
156	305
156	307
102	443
159	344
159	561
102	443
164	647

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ELLIOTT, J.—In the promissory notes upon which the complaint of the appellee is founded, the description of the payee is Oliver R. Dougherty. The answer to the complaint is in two paragraphs, but, as they are substantially the same, it is only necessary to give a synopsis of one of them. It is alleged that the sole consideration of the notes was the execution of a lease by the plaintiff to the defendants Monroe and Madison Avery; that in the lease the plaintiff covenanted with the defendants that they should have the peaceable, quiet, and undisturbed possession and enjoyment of the land therein described for the term of three years; that the defendants entered into the possession of the land; that prior to the time the notes sued on became due, the plaintiff wrongfully, and without the knowledge or consent of the defendants, entered upon the land, cut down and worked into saw logs and staves a great number of trees; that the plaintiff and his servants entered upon the land at seasons when the ground was soft and spongy, and also after the defendants had planted corn, with horses and wagons, and tramped and packed the ground, thereby injuring the crops of the defendants; that the plaintiff left the tops of the trees cut down by him lying on the ground where they fell; that the defendants were compelled to remove these tree tops at an expense of five hundred dollars; that by reason of the wrongful entry and unlawful acts of the plaintiff, the defendants were deprived of the possession of the demised premises and greatly damaged, to wit, in the sum of five hundred dollars.

It is alleged that Jesse Avery executed the notes as the surety of Madison and Monroe Avery. The conclusion and prayer of the answer is substantially as follows: Wherefore defendants say that the consideration of the notes has failed, and they pray that the damages so sustained by said Madison and Monroe Avery may be recouped, and they have judgment for the money paid upon the notes by them, together with all other proper relief.

The lease is not well drawn, and is evidently the work of

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an unskilful person, for many of the usual and appropriate provisions of a lease are absent. There is, however, enough in the instrument to fix the term, describe the property demised, and designate the amount of rent to be paid by the tenant; there are covenants on the part of the lessee to pay rent, to take care of the premises, and make repairs. There are no express covenants on the part of the lessor, nor is any right of entry reserved. Reference is made to the notes sued on; it is recited that they were given for the rent of the demised premises, and dates, amounts and times of maturity are stated. The introductory clause of the lease reads thus: "This agreement, made this 25th day of December, 1880, between Randolph Marshall, agent of Oliver Dougherty, guardian of his minor children, and Madison Avery and Monroe Avery," and the instrument is signed "Randolph V. Marshall, agent of O. R. Dougherty."

The appellee's counsel assert that the lease is executed by Marshall, and not by Dougherty, and that the allegation that it was executed by the latter is overthrown by the exhibit. It is true that the allegations of a pleading are controlled by the statements of the instrument upon which it is founded. *Hines v. Driver*, 100 Ind. 315, and auth. cited p. 317. It is also true that mere descriptive words are regarded as simply describing the person. *Jackson School Tp. v. Farlow*, 75 Ind. 118, see auth. cited p. 123. This doctrine applies to leases as well as to other instruments. *Wood Landlord and Tenant*, 203. The rule is firmly engrafted in our law, but it is not easy to find any real ground for it in this country, where there are no titles, designating rank or condition in life. In England there was reason for the rule; here there is none. The better doctrine would be that the words annexed to the name may be explained by extrinsic evidence; but the rule has been too long and too firmly settled to be shaken now. While accepting the general rule to be that stated, the American authorities agree that, if the contract itself shows that the words were not used as merely descriptive of the person,

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they will not be so regarded, but will be assigned their real meaning. In the instrument before us it clearly appears that Marshall was the agent of the lessor, and acted as such, for we find this recited: "That the said Marshall, agent as aforesaid, has rented to Madison and Monroe Avery." There are other provisions in the instrument clearly showing that Marshall executed the lease as the agent of Dougherty, and we have no doubt that it should be treated as having been executed by him, and that the improper description of the lessor in the introductory clause of the lease must be attributed to the unskilfulness of the draftsman of the instrument.

The general rule is that a tort can not be made to constitute a defence either by way of set-off or counter-claim. *Lovejoy v. Robinson*, 8 Ind. 399; *Slayback v. Jones*, 9 Ind. 470; *Shelly v. Vanarsdoll*, 23 Ind. 543; *Terre Haute, etc., R. R. Co. v. Pierce*, 95 Ind. 496, p. 500. If the answer is to be regarded as an attempt to set up a tort by way of counter-claim, as appellee contends, then these authorities are decisively in his favor; the appellants, however, contend that the answer does not count upon a trespass, but upon a breach of the covenant for quiet and peaceable enjoyment. The case, therefore, turns upon the question whether the answer pleads a defence founded on breach of a covenant, or pleads a defence arising out of a trespass.

It is true that the lease under examination contains no covenant for quiet enjoyment, but there is nevertheless such a covenant, for, where the demise is for a term certain, the law imports such a covenant into the lease. This principle has solid support in reason. It would be a contradiction to affirm in one breath that the tenant is invested with the right of possession, and in the next affirm that the landlord might deprive him of his right by an entry. The doctrine is, however, so well settled that it need not be supported by argument. *Wood Landlord and Tenant*, 564; *Taylor Landlord and Tenant* (7th ed.), section 304; 2 *Platt Leases*, 9. The lease of the appellants, by force of law, contained this cov-

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enant, and a breach of it would give them a right of action against the landlord.

Having ascertained and decided that the lease contains, by force of law, the covenant for quiet enjoyment, the only remaining general question is whether the facts pleaded constitute a breach of covenant or a trespass. It is quite well settled that it is not every entry of the landlord, although wrongful, that constitutes a breach of covenant; a landlord may be a trespasser without breaking the covenant. An English writer says: "Generally speaking, a covenant for quiet enjoyment, or a bond for the performance of such a covenant, extends to secure the enjoyment against lawful interruptions only, although the word *lawful* be not contained in the covenant; the law having provided an action of trespass as the means of redressing an unlawful entry or disturbance. An early case to the contrary has long since been virtually, if not expressly, overruled." 2 Platt Leases, 312. This, however, is the rule only where a stranger enters. Where the lessor enters the rule is somewhat different. The author from whom we have quoted says: "But a disturbance of the lessee by the lessor himself is not regarded with the same lenity, as an eviction by a stranger; it being clear, that the lessor exposes himself to an action on his covenant, although he enter wrongfully, notwithstanding the covenant provides against *lawful* evictions only; for, in such case, the court will not consider the word *lawful*; nor drive the plaintiff to his action of trespass, when by the general implied covenant in law the lessor has engaged not to avoid his own deed, either by a rightful or tortious entry. Indeed, it would hardly be consistent with reason to allow the lessor to defeat the tenancy by pleading his own wrong." 2 Platt Leases, 313. Although the law is more strict against the lessor than a stranger, still, a mere entry, though wrongful and unlawful, will not constitute a breach of covenant. It is necessary that something more than an entry and injury be shown, for these are the elements of a trespass, it must also be shown that the

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entry was an assertion of right or title, in other words, was in the nature of a total or partial eviction. 2 Platt Leases, 314; Taylor Landlord and Tenant (7th ed.), section 305.

A late writer says: "It must be remembered, however, that the act done must be in the assertion of title, and not a mere tortious act for which an action of trespass might be maintained." Wood Landlord and Tenant, 574. Another author says: "Nor will any acts of molestation, even if committed by the landlord himself, or by a servant at his command, occasion a breach of the covenant, unless they are more than a mere trespass." Taylor Landlord and Tenant (7th ed.), section 309.

In *Fuller v. Ruby*, 10 Gray, 285, it was said: "An interruption of a tenant, by the landlord, is not necessarily an eviction of him. And nothing less than an eviction will suspend rent, either in whole or in part. On this ruling the jury may have found their verdict on a mere trespass, or temporary disturbance of the defendant, by the plaintiff, for which the remedy was by action, and not by withholding pay for the use and occupation which was enjoyed. 1 Saund. 204, note 2; Com. Land. and Ten. 197; 5 Dane Ab. 310; *Bennet v. Bittle*, 4 Rawle, 339; *Ogilvie v. Hull*, 5 Hill, 52."

What will constitute a breach of the covenant for quiet enjoyment was defined in *Upton v. Townsend*, 17 C. B. 30: "I think it may now be taken to mean this,—not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises."

In *Mayor, etc., v. Mabie*, 13 N. Y. 151, DENIO, J., speaking for the court, said: "It is not, however, every mere trespass by the lessor upon the demised premises which will amount to a breach of this covenant. Although the covenantor can not avail himself of the subterfuge that his entry was unlawful, and be therefore a trespasser to avoid the consequences of his own wrong, still, to support the action of covenant,

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the entry must be made under an assumption of title." The adjudged cases, with much steadiness, support these views. *Bennet v. Bittle*, *supra*; *Ogilvie v. Hull*, *supra*; *Lounsbery v. Snyder*, 31 N. Y. 514; *Edgerton v. Page*, 20 N. Y. 281; *Randall v. Alburdis*, 1 Hilt. (N. Y.) 285; *Campbell v. Shields*, 11 How. Pr. 565; *Drake v. Cockroft*, 4 E. D. Smith, 34; *Hayner v. Smith*, 63 Ill. 430. Our own case of *Slayback v. Jones*, *supra*, asserts substantially the same doctrine, although not in express terms. The authorities to which we have referred lead to the conclusion that the answer states facts constituting a trespass, and not a breach of covenant, for the reason that it does not show an entry under an assumption of title.

The question, it is proper to remark, comes to us as one of pleading, and not as one of evidence. In pleading, the rule is that facts must be directly stated, so that issue may be joined upon the averments of the complaint or answer; it is not sufficient to state mere matters of evidence. In the present instance the answer shows an entry, and shows a right of action in the defendants, but it does not show a breach of covenant, and we can not supply by inference or intendment the element essential to constitute a breach of covenant, namely, the assumption of title. Whether it might be inferred if the question were one of evidence we do not decide, for we are here concerned only with a pleading.

Judgment affirmed.

Filed June 27, 1885.

No. 11,026.

HUNTER v. FITZMAURICE.

SUPREME COURT.—*New Trial*.—*Assignment of Error*.—Overruling a motion for a new trial, assigning as cause therefor error in sustaining a demurrer to an answer, when assigned for error in the Supreme Court, presents no question on such answer.

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PROMISSORY NOTE.—*Surety.—Forged Signature.—Acceptance without Notice.*

—When the name of one of two or more obligors on a note is forged, the supposed co-obligor, though a surety only, and though he signed in the belief that the forged name was genuine, is nevertheless bound, if the payee accepted the note without notice of the forgery.

SAME.—*Agency.*—The fact that the maker of a note, at the mutual desire and request of the proposed payee and surety, takes it to obtain the signature of an additional surety, does not constitute him the agent of such payee.

SAME.—*Innocent Parties.*—Where one of two innocent parties holds the legal obligation of the other, and the law can not divide the loss, he is in the situation of advantage who holds the obligation.

From the Ripley Circuit Court.

J. O. Cravens, for appellant.

W. D. Willson and C. H. Willson, for appellee.

MITCHELL, C. J.—This suit was brought by Fitzmaurice against Durbin, Hunter and Wernke, to recover the amount of a promissory note. In the complaint it is averred that the note was executed on the 25th day of June, 1880. A copy of the note filed with and referred to as an exhibit in the complaint bears date June 25th, 1882, and shows that the note was to run six months from its date. As appears from a copy of the summons set out in the record, the suit was commenced November 3d, 1882. There was no demurrer to the complaint. An answer of *non est factum* was filed by Wernke, and a separate special answer by Hunter. A demurrer was sustained to the separate answer of Hunter, after which an additional answer was filed by him, to which a demurrer was also sustained. Refusing to plead further, there was judgment in favor of Wernke, and against Durbin and Hunter.

There was a motion for a new trial by Hunter, assigning as cause therefor that the court erred in sustaining the demurrers to his separate answers, and the overruling of this motion is assigned for error here. Under repeated rulings, this assignment presents no question on the answers.

The second assignment of error, omitting the reference to the pages and lines of the record therein set out, is as fol-

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lows: "That the court erred in sustaining the appellee's demurrer to the answer of the appellant. This demurrer ought to have been sustained to the complaint. It is bad, because the note sued on was not due. *Town of Brazil v. Kress*, 55 Ind. 14. Demurrer searches the record. Authority is not needed on this proposition. The court erred in overruling the appellant's demurrer to the additional paragraph of answer."

Under the assignment which is set out above, it is contended the court erred in not carrying the demurrer back and sustaining it to the complaint. The defect in the complaint insisted on is that suit was brought on the note before it fell due. Upon this question, if it was properly assigned, the ruling in *Trentman v. Fletcher*, 100 Ind. 105, is applicable. *Stockwell v. State, ex rel.*, 101 Ind. 1. We are of opinion, however, that the assignment of error above set out presents no question except the rulings on the answer.

The substance of the first paragraph of Hunter's answer was that he signed the note as surety for Durbin; that at the time he signed the note he, Durbin, and Fitzmaurice were present; that Hunter, in the presence of Fitzmaurice, said to Durbin that he would not go surety on the note with him alone, and that Fitzmaurice also interposed, and said he wished additional security besides Hunter. Thereupon Durbin proposed to have Wernke sign as maker with him, upon which Hunter said to him and Fitzmaurice that he would sign the note upon condition, and with the express understanding, that Wernke should sign it, and that Fitzmaurice should not loan any money to Durbin or receive the note until Wernke had signed it, and that it was then agreed that he was not to be bound by the note until it was so signed, and that upon this express consideration Hunter signed it; that Durbin then took the note with the knowledge of Fitzmaurice in order to procure Wernke's signature; that Wernke never did sign it, but that his signature was forged to the note and returned to the payee.

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The additional answer of Hunter contains substantially the same averments as those above set out, with the addition that it was agreed between Hunter, Durbin and Fitzmaurice that Durbin should take the note, after it was signed by him and Hunter, and procure the signature of Wernke, and that Hunter notified the payee that he should not accept the note until Wernke had signed it, and that Fitzmaurice remarked he would not loan Durbin the money without other surety than Hunter, and directed Durbin to take the note and obtain the signature of Wernke; that Durbin did take it for that purpose, and returned it with Wernke's signature forged to it. There is no claim that the payee of the note had any notice of the forgery at the time he received the note. It is contended that Durbin was, under the circumstances, as much the agent of Fitzmaurice as of Hunter to procure the signature of Wernke.

It seems to us the contention between the parties here is foreclosed at all points by the decision in the case of *Helms v. Wayne Agr'l Co.*, 73 Ind. 325 (38 Am. R. 147). In that case it was said: "When the name of one of two or more obligors in a bond, note, or other writing obligatory, has been forged, the supposed co-obligor, though a surety only, and though he signed in the belief that the forged name was genuine, is nevertheless bound, if the payee or obligee accepted the instrument without notice of the forgery."

The proposition above stated is sound in principle and well supported by authority. Besides, the case contains a valuable exposition of the reason upon which the rule rests, to which nothing can be added. Adapting the language there used to the case before us, we say there is nothing in the claim of counsel that Durbin was the agent of the plaintiff in procuring the signature of Wernke to the note.

The case bears no analogy to *Cline v. Guthrie*, 42 Ind. 227 (13 Am. R. 357), relied on by appellant. In that case the signature of the maker was procured by a fraud practiced on him by the payee, who obtained possession of the note by force and

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wrong; while here no pretence of wrong or bad faith is imputed to the payee. The facts averred in the answer do not warrant the assumption that Durbin became his agent in any sense to procure the signature of Wernke. If it were true, as claimed, that he became as much the agent of one as of the other, it would hardly do to say that of the two innocent principals the plaintiff must bear the entire loss, notwithstanding his contract. In such case, as one of the innocent parties holds the legal obligation of the other, and as the law can not divide the loss, he is in the situation of advantage who holds the obligation. As before stated, the facts averred do not constitute a case of agency. The ruling of the court was right, and the judgment is affirmed, with costs.

Filed June 27, 1885.

108	453
197	88

No. 12,098.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILWAY COMPANY v. RANDALL.

LANDLORD AND TENANT.—*Lease.*—*License.*—An instrument conveying an estate in land, subordinate to that of the grantor, to a grantee, upon a valid consideration, and for a definite term, is a lease, and not a license, as a license grants no estate in land.

SAME.—*Effect of Holding Over.*—Where a tenant holds over after his lease has expired, the inference that the parties consent to a continuation of the same terms is so strong that it is adopted as a rule of law.

SAME.—*Collateral Stipulations.*—In such case, where the lease contains collateral stipulations which can be performed after the expiration of the first term, they are made continuous by the implied consent of the parties.

From the Allen Superior Court.

W. H. Coombs, R. C. Bell and S. L. Morris, for appellant.
P. A. Randall and W. J. Vesey, for appellee.

NIBLACK, J.—The complaint in this case charged that the appellant, the New York, Chicago and St. Louis Railway

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Company, and the appellee Perry A. Randall, on the 15th day of October, 1881, entered into an agreement in writing as follows :

“This agreement, made this 15th day of October, 1881, by and between Perry A. Randall, party of the first part, and the New York, Chicago and St. Louis Railway Company, party of the second part, witnesseth, That the said party of the first part hereby grants and leases to the said party of the second part the right to construct a railroad track, commonly called a ‘Y,’ from the line of its railroad, west of where it intersects the line of the railroad of the Pittsburgh, Fort Wayne and Chicago Railway Company, over and upon a portion of the N. W. frac. $\frac{1}{4}$ of section six, township 30 north, of range 12 east, in Allen county, owned by said Randall, upon the line now designated and located for said ‘Y,’ so as to connect the road of the said party of the second part with the Pittsburgh and Chicago Railroad, and to occupy and use for such construction a strip of land 50 feet wide upon each side of said line, and to hold, use, occupy and operate said track upon and over said right of way for the period of one year from the date hereof, in consideration of the payment by said party of the second part, to said party of the first part, of the sum of \$400, the receipt of which is hereby acknowledged. It is also further agreed that if said party of the second part at, or at any time before, the expiration of this lease, shall determine to permanently use said track and right of way, and so notify said Randall, it shall have the right to proceed to appropriate the same and have the value thereof fixed as provided by law in case of condemnation or appropriation of lands for the use of railroad companies, without prejudice from or by reason of this agreement, or the use or occupancy hereunder, the same as if such proceedings were begun at this time, and said sum of \$400, so paid as aforesaid, shall in that event be applied and credited and allowed as a payment on the sum so fixed as the price of said premises in such proceedings to appropriate as aforesaid; and in any such

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proceedings to appropriate and fix thereunder the value of said premises, no account shall be taken of the value of any work done or property placed thereon by the said party of the second part in constructing and using its said track, and should it not desire to permanently use nor appropriate said premises, it shall, at the expiration of this lease, have the right to remove any ties, rails or superstructure placed by it on said premises."

The complaint further charged that, on the said 15th day of October, 1881, the railway company entered into the possession and occupation of the strip of ground therein described, pursuant to said agreement; that after the 15th day of October, 1882, the railway company elected to continue its tenancy of said strip of ground for another year from that day, upon the same terms and at the same rent as provided by the agreement for the preceding year, and continued and remained in the possession and occupation of the same; that there was due from said railway company to the said Randall the sum of \$400 for rent for said strip of ground for the year commencing on said 15th day of October, 1882, which remained unpaid.

A demurrer to the complaint being first overruled, the railway company answered in six paragraphs. The first paragraph was in denial. The second averred that at the time the agreement referred to was entered into, the lands described by it were uninclosed timbered lands and of very little rental value; that the sum of \$400 mentioned in the agreement was paid to the plaintiff as a compensation in gross for the injury which would result to his lands, including the timber thereon, by the construction of the proposed railroad track and the privileges connected therewith, without the institution of proceedings to permanently appropriate said lands, and not as the rental value thereof; that having, at the end of the first year, no further use for the connecting railroad track provided for by the agreement, it ceased to use the same, except at short times and upon a few occasions,

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when empty cars were placed thereon without injury to the plaintiff; that within three months after the expiration of said first year, it, with the consent of the plaintiff, removed its railroad from the plaintiff's lands; that it did not either expressly or impliedly elect to continue its agreement with the plaintiff for another year, nor did it ever, either expressly or impliedly, promise to pay more than the reasonable rental value of the strip of ground used by it in the manner and form above stated; that such reasonable value did not exceed the sum of \$50, for which, with costs, it offered to confess judgment.

The fourth paragraph of answer was a plea of payment, and the third, fifth and sixth paragraphs were, in their general purport and meaning, substantially similar to the second. Demurrers were sustained to the second, third, fifth and sixth paragraphs. The first paragraph was thereupon withdrawn, and the cause was then submitted to the court for trial upon an issue formed only upon the answer of payment, the result being a finding and judgment for the plaintiff for \$400.

Questions were reserved only upon the pleadings, and whether the contract entered into between the parties was a lease, or only an agreement in the nature of a special license not extending beyond the end of the year, is made the leading, and, indeed, the controlling question in the cause.

Sutherland on Damages, vol. 3, 108, says: "Where a tenant holds over after his lease has expired, the inference that the parties consent to a continuance of the same terms is so strong that it is adopted as a rule of law. But the rule does not apply, and such an agreement is not implied where the lease contains many collateral stipulations which could not be performed in a subsequent term; nor where the intention to continue the same terms is otherwise rebutted by the terms of the lease, or the conduct of the parties."

Taylor on Landlord and Tenant, at section 525, states the same rule as follows: "Where the landlord suffers the tenant to remain in possession after the expiration of the original

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tenancy, the law presumes the holding to be upon the terms of the original demise, subject to the same rent, and to all the covenants of the original lease, so far at least as they are applicable to the new condition of things." See, also, *Woods Landlord and Tenant*, section 13, p. 18; *Schuyler v. Smith*, 51 N. Y. 309.

If, therefore, the agreement, counted on in this case, was a lease, the holding over by the railway company, without any new contract, worked as to it a continuance of the agreement for another year.

It is true, as contended, that calling a written instrument a lease does not necessarily impress that character upon it. But it may be said in general terms that where the conveyance of an estate in land, subordinate to that of the grantor, to a grantee, upon a valid consideration, and for a definite term, is made, the instrument making the conveyance is a lease. Less than this might, under some circumstances, constitute a lease; more is evidently not required. *Bouvier Law Dictionary*, title "Lease;" *Munson v. Wray*, 7 Blackf. 403. Tested by this definition the agreement before us was a lease. It was certainly more than a license, since a license grants no estate in the land. 1 Washb. Real Prop. 629; *Knight v. Indiana C. and I. Co.*, 47 Ind. 105 (17 Am. R. 692). Its collateral stipulations were such as might have been performed after the expiration of the first year, and were consequently made continuous by the implied consent of the parties. *Kerr v. Day*, 14 Pa. St. 112. We, therefore, regard the complaint as having been sufficient upon demurrer.

The paragraphs of answer to which demurrers were sustained admitted in effect the holding over by the railway company without any new contract either changing or modifying the original agreement. They only sought to have a construction placed upon the agreement different from that which we have given it, and different from what appears to us to be the plain import of the language used by it in declaring the purposes for which the parties entered into it.

Deeter v. Sellers *et al.*

Montgomery v. Board, etc., 76 Ind. 362 (40 Am. R. 250); *Terstege v. First G. M. B. Society*, 92 Ind. 82 (47 Am. R. 135); *Bollenbacker v. Fritts*, 98 Ind. 50. For these reasons the demurrers to those paragraphs of answer were properly sustained.

The judgment is affirmed, with costs.

Filed April 28, 1885. Petition for a rehearing overruled Sept. 17, 1885.

No. 11,907.

DEETER v. SELLERS ET AL.

PRACTICE.—*Special Finding.*—*Remedy where there is Failure to Find all Facts Established by Evidence.*—*Venire de Novo.*—*Motion for New Trial.*—Where the special finding fails to find all the facts established by the evidence, the remedy is by a motion for a new trial, and not by a motion for a *venire de novo*.

REPLEVIN.—*Demand.*—*Agent.*—Where there is a tortious taking of personal property, no demand is necessary, but, where a demand is necessary, it is sufficient to make it of the agent in possession of the property.

PARTNERSHIP.—*Chattel Mortgage Executed for Individual Debt of Partner.*—A partner has an interest only in the property of the partnership remaining after the payment of the partnership debts, and a chattel mortgage executed by one partner, for his individual debt, upon specific articles of property belonging to the partnership, conveys no lien as against the claims of creditors of the partnership.

SAME.—A chattel mortgage, executed by one partner upon partnership property for his individual debt, can not operate to deprive the other partner of the right to hold the property for the payment of a sum due him for money advanced to the partnership.

PLEDGE.—*Right of Pledgee to Possession.*—*Chattel Mortgage.*—A pledgee of personal property has a right to hold possession of the property pledged to him, and he can not be rightfully deprived of possession under a chattel mortgage executed after the property was pledged to him.

From the Whitley Circuit Court.

C. Clemans, for appellant.

L. H. Haymond, L. W. Royse, T. R. Marshall and W. F. McNaghy, for appellees.

108	458
135	610
102	458
144	606
102	458
150	102
158	458

Deeter v. Sellers et al.

ELLIOTT, J.—The complaint of the appellee alleges that he is the owner and entitled to the possession of personal property, which is specifically described, and that it is unlawfully detained by the defendants. A special finding of facts was made, and conclusions of law stated. From the finding we condense the material statements: The action was commenced July 5th, 1883. On the 29th day of the preceding May Samuel M. Deeter executed to his brother, the defendant George C. Deeter, a chattel mortgage on the property, to secure the payment of a promissory note of one hundred dollars; the mortgage gave the mortgagor the right of possession, but provided that if he sold or encumbered, or offered to sell or encumber the property, the mortgagee might immediately take possession. The mortgage was duly recorded on the day it was executed; at the time of the execution of the mortgage the property mortgaged was not the individual property of the mortgagor, but was owned by a partnership, composed of the plaintiff, Perry Sellers, and the mortgagor; the plaintiff did not know of the execution of the mortgage, and has never consented to its execution; the debt secured by it was the individual debt of the mortgagor, Samuel M. Deeter; at the time of the execution of the mortgage the mortgagor was indebted to the plaintiff in a sum much greater than the value of the property on account of money advanced to the partnership; at the time of the execution of the mortgage the plaintiff had possession of the property in pledge as security for the indebtedness of the mortgagor to him; within a few days after the execution of the mortgage the partnership was dissolved and an accounting had, whereby it was agreed that the property should be owned and held by the plaintiff; it appeared from the accounting that Samuel M. Deeter was indebted to the plaintiff in the sum of \$158.39, and that there was no partnership property out of which it could be made; after the accounting, and while the property was in the possession of the plaintiff, the defendant George C. Deeter and one William Breezely secured possession of the property by ex-

Deeter v. Sellers *et al.*

hibiting the mortgage and representing that the former could obtain the property by legal proceedings; the defendant placed the property in possession of Breezely, from whom the plaintiff demanded it, but the demand was met by a refusal; two days after this demand the plaintiff filed his complaint, and at that time it was in the possession of George C. Deeter, who claimed it under the chattel mortgage.

The second conclusion of law is the only one that it is necessary to state; it is as follows: "The plaintiff is entitled to recover against the defendant George C. Deeter in this action the possession of said property described in the complaint, and to have a judgment against him for a return of said property."

A motion was made for a *venire de novo*, for the reason that the court did not, as the motion alleges, find the facts established by the evidence. This motion was properly overruled. Where the court does not find facts established by the evidence the appropriate motion is for a new trial.

The appellant's counsel argues that the evidence fails to prove that there was an unlawful detention of the property, but we think the position assumed is not maintainable. A demand of an agent is a demand of the principal, and under the circumstances of this case the demand of Breezely while in possession of the property was all that was necessary, even conceding that it was incumbent on the appellee to make a demand. There was, however, no necessity for a demand, for the appellant had converted the property, and had not only done this, but he had also wrongfully obtained possession of it. *Cox v. Albert*, 78 Ind. 241; *Wells Replevin*, sections 345, 348.

A pledgee has a right to the possession of the property pledged and may maintain replevin against one who wrongfully takes or unlawfully detains it, and under this rule the appellee's cause of action was fully made out without reference to the rights of Sellers as partner. *Jones Pledges*, section 429.

A partner has an interest only in the partnership property

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remaining after the payment of the partnership debts; he has no several right in any specific property, but has a right in what remains after a settlement of the partnership affairs. A mortgage by one partner of partnership property for his individual debt conveys no title or lien as against the partnership or its creditors. *Jones Chattel Mort.*, section 45; *State, ex rel., v. Emmons*, 99 Ind. 452, auth. p. 456. A mortgage by a partner to secure his individual debt can not deprive his copartner of the right to the possession of the partnership property. The case of *Emmons v. Hawn*, 75 Ind. 356, cited by the appellant, has no bearing whatever upon the mortgage of partnership property for an individual debt of one of the partners.

The mortgage did not vest in Deeter a right to take possession of the partnership property; the partner in possession had a right to hold it until partnership debts were paid, and then the mortgagee might only fasten his mortgage upon what remained, and as nothing remained, in this instance, in the mortgagor, there was nothing upon which the mortgage could operate. A partner can not apply to individual debts the property of the partnership, and, therefore, the mortgage executed to appellant could not in any wise abridge the rights of the appellee. *Hagar v. Mounts*, 3 Blackf. 57; *Hickman v. Reineking*, 6 Blackf. 387; *Jones Chattel Mort.*, section 45.

Judgment affirmed.

Filed June 25, 1885.

No. 12,192.

ROTACH v. MCCARTY.

MARION SUPERIOR COURT.—*Appeal.—Assignment of Error.—Practice.*—On appeal from the general term of the Marion Superior Court to the Supreme Court, only such errors as were assigned in such general term will be considered.

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FRAUD.--*Contract.*--*Damages.*--*Evidence.*—For a consideration of evidence held sufficient to sustain a judgment for damages for fraudulent violation of contract, see opinion.

INSTRUCTIONS TO JURY.—*Weighing Evidence.*—In the absence of a request for fuller instruction, it is not error for the trial court to say to the jury that they are familiar with the manner of weighing evidence, and that further instruction is not necessary.

From the Marion Superior Court.

E. A. Parker, J. E. Florea and A. W. Wishard, for appellant.
L. Ritter, E. F. Ritter and B. W. Ritter, for appellee.

MITCHELL, C. J.—Prior to the 30th day of January, 1883, Rotach was the owner of a dairy near the city of Indianapolis, and was engaged in retailing milk therefrom to customers upon a certain route, who were supplied from his wagons.

On that day a written agreement was entered into between Rotach and McCarty, by the terms of which the former sold to the latter two horses, the milk wagons, cans, etc., together with the route over which he operated, for a consideration therein named.

It was further stipulated that Rotach should daily furnish to McCarty seventy gallons of milk, more or less, at fourteen cents per gallon, the year around, to supply the customers on the route.

This suit was brought by McCarty, who alleged the making of the agreement, exhibiting a copy with the complaint, and that he had paid thereon the sum of two hundred and fifty dollars, and executed his notes for the residue. He averred that in pursuance of the contract he had taken possession of the horses, wagons and route, had expended about five hundred dollars in expenses in conducting the business, that Rotach, in violation of his contract, had habitually delivered to him milk which was adulterated with water, by means of which his customers left him, and his business was broken up; that he had surrendered the property to Rotach, who had received the same and converted it to his own use, and that he had sustained damage, etc.

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Upon issues made the case was tried by a jury; verdict and judgment for the plaintiff.

On appeal to the general term the only error assigned was the overruling of the appellant's motion for a new trial. The appellant, in addition to the assignment that the court, in general term, erred in affirming the judgment of the special term, assigns here that the complaint does not state facts sufficient to constitute a cause of action. Under the well settled rule this court can consider no errors except such as were assigned in the general term. *Leary v. Smith*, 81 Ind. 90, and cases cited.

The appellant's principal contention is that the verdict of the jury is not sustained by the evidence.

Assuming, as in the state of the record we must, that the complaint contains the statement of a cause of action, we think the evidence fairly tends to establish its material averments.

It may be admitted that the basis upon which the jury arrived at the amount of damages does not clearly appear in the evidence, but it does appear that the plaintiff had paid to the defendant for the horses, wagons, cans and route, \$250 in cash, and that he had expended his time and some additional means in prosecuting the business under the contract. It also appeared that his sales of milk fell off from seventy gallons and upwards per day, to fifty and less, and it may have been inferred that this falling off was on account of the inferior quality of the milk furnished.

On account of the alleged misconduct of the appellant the appellee surrendered up the property and business. These were taken possession of by the appellant and converted to his own use.

If the jury believed, as well they might, that McCarty was compelled to give up the property and business on account of the fraudulent conduct of the appellant, they may have found that the amount which had been paid on the property, together with the loss sustained in the business resulting from the appellant's failure to supply milk fit for use,

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as his contract implied, was equal to the sum allowed in their verdict.

Conceding that the appellee was not entitled to recover for prospective profits, he had, nevertheless, the right to recover the actual damage which he sustained, and as the appellant took the property back it was competent to consider the amount paid on the contract, and the injury sustained by the delivery of inferior milk and the result which flowed therefrom.

At all events, simply because we can not now discover the precise theory upon which the jury arrived at the amount of their verdict, we can not say it is not supported by the evidence.

It was not error for the court to say to the jury that they were familiar with the manner of weighing evidence, and that it was not necessary that they should be instructed in reference thereto. If the appellant desired that the jury should be further instructed in that regard, he should have made his request to the court.

With reference to the other points suggested in counsel's brief, we have examined them and find no error in the record.

Judgment affirmed, with costs.

Filed May 25, 1885; petition for a rehearing overruled Sept. 18, 1885.

No. 10,288.

UNION SCHOOL TOWNSHIP v. FIRST NATIONAL BANK OF
CRAWFORDSVILLE.

SCHOOL CORPORATION.—*Promissory Note.*—*Bank.*—*Deposits.*—Where the trustee of a school corporation executes promissory notes in the name of the corporation, deposits the money in his own name, and draws it out upon checks signed by himself as an individual, he becomes the creditor of the bank for such deposits, and the transaction is one between the bank and its depositor.

SAME.—*Authority of Trustee to Borrow Money.*—The trustee of a school cor-

102	464
102	89
102	96
102	134
137	394
137	430
138	582
102	464
144	188
146	475
147	236
147	700
102	464
149	305
102	464
163	206
102	464
163	669

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poration has no authority to borrow money and execute promissory notes therefor in the name of the corporation.

SAME.—Liability of Corporation.—Subrogation.—Where the school trustee borrows money and executes notes therefor in the name of the school corporation, the corporation will be liable if the money is actually used for the payment of legitimate claims against the corporation, and the circumstances are such as make it equitable that the lender should be subrogated to the rights of the persons whose claims the borrowed money paid.

SAME.—No Liability where Trustee has School Funds in his Hands.—Where the trustee has money in his hands derived from the school revenues or funds, the lender of money can not be subrogated to the rights of the persons holding claims against the school corporation.

SAME.—Authority of School Trustee Statutory.—Duty of Persons Dealing with Him to Ascertain the Extent of his Authority.—A school corporation is one of very limited powers; the authority of the trustee is purely statutory, and all who deal with him must, at their peril, ascertain the extent of his authority.

SAME.—Estoppel.—Public and Private Corporations.—There is an essential difference between public and private corporations, for the officers of the former, exercising statutory powers, can not bind the corporation by estoppel where the acts relied upon as creating the estoppel are beyond the scope of the authority vested in such officers.

RES ADJUDICATA.—Decision on Former Appeal.—The general rule is that a decision on appeal governs the case throughout all its subsequent stages, but this rule does not apply to merely incidental or collateral questions; it applies to such questions only as were presented for decision, and were decided as essential to a just disposition of the pending appeal.

SUPREME COURT.—Practice.—Evidence.—The Supreme Court will not weigh conflicting evidence, but will accept that deemed credible by the trial court, and will apply the law to the facts established by such evidence.

SAME.—Petition for Rehearing.—Points not made on the original argument will not be considered on the petition for a rehearing.

From the Montgomery Circuit Court.

E. C. Snyder and M. W. Bruner, for appellant.

G. W. Paul, J. E. Humphries, J. R. Coffroth and T. A. Stuart, for appellee.

ELLIOTT, J.—John R. Robinson was the legally-acting trustee of Union township from February 15th, 1873, to October, 1876; the public moneys, or the greater part thereof, received by him during that period were deposited by him

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with the First National Bank, the appellee, from time to time as they were received by him, and were by the officers of the bank placed to the credit of Robinson on the books of the bank; in keeping the accounts the bank made no entries showing the fund or funds of the township to which the deposit belonged; and it had no knowledge as to what fund the deposit did belong. During the period above mentioned John R. Robinson, as trustee of Union township, borrowed from the bank, for the use of the township, the sum of \$30,000, and, after deducting discount at 10 per cent. per annum for the time the several loans were to run, the bank passed to the credit of Robinson, on her books, the residue, and paid the money out on the individual checks of Robinson. It paid in the same manner the money deposited by Robinson which he received of the revenues of the township, and there was nothing on the face of the checks to show for what purpose the money was paid; whether it was on a claim due from the township, civil or school, or the individual debt of John R. Robinson, was not disclosed. At the time each loan was made to Robinson by the bank a note was executed by him, signed Union township, John R. Robinson, trustee; and the money so borrowed, less the discount, was passed to his credit on the books of the bank, and was by the bank paid out on the checks drawn by him. At the time each loan was made there was retained by the bank a certain sum as discount or interest in advance, which discount or interest was computed at the rate of 10 per cent. per annum, and the whole amount so retained was \$683.86. Many of the loans were not paid at maturity, but were renewed from time to time, and the bank charged interest on the same at the rate of 10 per cent. per annum, and the whole amount of interest so paid by Robinson to the bank was \$2,325.60, and the interest on the renewals if computed at 6 per cent. would have been \$1,295.36. There was paid out of the sums so borrowed, on account of the legitimate expenses due from the township tuition fund, the sum of \$20,695.11. This sum was paid out by the bank on the

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checks of John R. Robinson to various persons to whom the school township was indebted for services performed for the school township; and at the time the money was borrowed and the payments made Robinson, had no other money than that borrowed with which to pay the indebtedness; and at the time the loans were so made the bank thought that it was loaning the money to Union township, and no credit was given to John R. Robinson as an individual. Robinson, during his term of office as trustee of Union township, received public funds belonging to the tuition fund of Union school township aggregating the sum of \$34,806.78, and expended on account of debts chargeable to that fund the sum of \$30,085.88, leaving a balance of tuition fund unexpended of \$4,718.15; and at no time during his term of office were the funds belonging to the tuition fund of the township exhausted on account of the expenses properly payable out of that fund. There was paid by the bank, out of the money borrowed by Robinson, on account of other debts due from the school township, the further sum of \$6,375.66, for building, repairing and furnishing school-houses in said township; and these amounts were due from the township at the time they were paid, and Robinson had no other money on hand with which to pay them except the borrowed money. Robinson, while trustee, received of public moneys belonging to the special school fund of said township the sum of \$18,370, and paid debts due from that fund to the amount of \$24,327.60, thus overdrawing the fund in the sum of \$5,956.80. Robinson paid the bank at various times on account of the loans made to him by the bank, the sum of \$20,700, and payments were made out of the money received by him belonging to the several township funds. Robinson never charged himself, in any of the settlements he made with the county commissioners, nor on his books, with any of the sums by him borrowed of the bank, but he asked and obtained credit for the discounts and interest paid by reason of said loans.

The ultimate conclusion from these facts is, that the trans-

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actions between the bank and Robinson were had with him as an individual, and not with him as the trustee of the school township. All the money received from the notes purported to be executed by him as school trustee, as well as all money received from school revenues, was deposited to his individual credit, and all money was paid out upon his individual checks. The fact that some of the money was derived from notes executed by him as school trustee does not weaken our conclusion, for the reason that the notes were not valid. It has been decided after careful investigation, that a township trustee has no authority to borrow money or to execute notes in the name of the school township. *Bicknell v. Widner School Tp.*, 73 Ind. 501; *Wallis v. Johnson School Tp.*, 75 Ind. 368; *First Nat'l Bank v. Union School Tp.*, 73 Ind. 361; *Pine Civil Tp. v. Huber M'f'g Co.*, 83 Ind. 121; *Reeve School Tp. v. Dodson*, 98 Ind. 497. When this case was here before it was said that the court erred in sustaining the demurrer to the sixth paragraph of the complaint, "not," to quote the language there used, "because of the note therein set forth, but because it shows that the moneys so borrowed, for the purpose of paying the corporate indebtedness, the appellee did apply to the payment thereof." *First Nat'l Bank v. Union School Tp.*, *supra*. It is manifest, therefore, that the execution of the notes did not bind the school corporation, and the only ground upon which it can be maintained with the faintest color of plausibility that the transactions were had with the school corporation, and not with Robinson as an individual, is, that the money was borrowed for the purpose of paying a legitimate debt of the corporation and was actually applied to that purpose. But even this color of plausibility fades away when it is brought to mind that the money received on the notes was placed to the individual credit of Robinson, was paid out upon his individual checks without inquiring whether it went to pay a corporate claim or not, and was paid out when the corporation had money of its own in the hands of its trustee. These are all

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important facts, but the last is of controlling force, for, if the corporation had money, then the trustee had no authority to obtain money from other sources to pay claims. When money was supplied from the public revenues, it was the duty of the trustee to use it in paying claims against the school corporation, and he had no authority to procure money from other sources and thus create a debt against the corporation. With school funds in his hands, he had not the slightest right to borrow money or create a debt. As he created no debt against the school township, and did not deal with the bank in his official capacity, it must look to him, and not to the school township, whose special agent he was.

There was a single account, and that account was with the individual; it was not with the school corporation. As Robinson had no authority to execute the notes as trustee, the corporation was not bound, and, therefore, the only ground upon which a claim against the school corporation could be made to stand would be that the bank had a just account against it; but this ground does not exist, for the plain reason that the only account the bank ever had was against Robinson as an individual. There can be no mistake as to this. The money from all sources went to Robinson's credit; it was paid out upon his individual checks; it was paid out indiscriminately as he drew for it in the course of his individual business and upon township claims, and was paid without knowledge of the specific purpose to which it was to be applied. It would be unjust to allow the bank to veer from its course and seize the money of the school corporation to pay an account due from an individual. It did not, until the end of the transactions, treat the money as received for school purposes; on the contrary it credited all money received to the individual. It did not appropriate the money to the payment of claims against the school corporation, but did appropriate it to the use of its depositor, John R. Robinson. It paid nobody but this depositor; it honored his checks because he was its depositor. It did not pay claim-

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ants; it only paid his checks. It reduced its indebtedness to no one except its creditor and depositor. There is neither an equitable nor a legal ground upon which the bank can found a claim to recover against the school corporation as for money paid for its use and benefit. The entire course of business and all the facts combine to show that the money was paid to Robinson upon his individual checks. Not a dollar was paid for the use or benefit of anybody else. From first to last Robinson was its debtor for the money advanced on the notes, and was its creditor throughout for the money placed to his credit as a depositor. In every instance the money was paid out upon his checks because he was a depositor with a balance to his credit, and was not paid in any instance because the claim was against the school corporation. It was not asked that it be specifically paid on corporate claims, nor was it borrowed for that specific purpose.

Robinson did not, in legal contemplation, appropriate the money received from the notes purporting to be executed by the school township to school purposes; he deposited it in a general way to his own credit, and so the bank received it. It was at all times subject to his check, for whatever purpose he desired to use it. There was no setting apart of the money in any form, nor was there any distinction in the use made of it, or in the form of the checks which called it from the vaults of the bank. It never became a specific corporate fund, nor was it ever specifically set apart to corporate purposes.

The trustee, in the management of the financial affairs of the school township, is a special agent, with limited statutory powers. He has no general authority to bind the corporation. His acts create a binding obligation against the school township only when he does the acts which the law authorizes, and does them in the manner which it prescribes. All who deal with him are bound to take notice of the scope of his authority. *Reeve School Tp. v. Dodson, supra*; *Pine Civil Tp. v. Huber, etc., Co., supra*; *Axt v. Jackson School Tp.*, 90 Ind. 101. The bank could not, therefore, be ignorant of the

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authority of Robinson in any case, much less in such a case as this, where it had such wide knowledge of the material facts. Nothing that Robinson could do in excess of his statutory authority could bind the township by estoppel or otherwise. The court said, in *Axt v. Jackson School Tp.*, *supra*: "In dealing with such trustee, the appellant was bound to take notice of his fiduciary character, and to know that he could only bind his township by his words and deeds, which were authorized by law." It was not in Robinson's power by checks, notes, or other instruments, to bind the school corporation unless the claim for which they were given existed against the township, and in this case no claim did exist. Even if the trustee had been guilty of fraud, the school corporation would not have been bound. *Lowell Five Cents Savings B'k v. Inhabitants of Winchester*, 8 Allen, 109; *Benoit v. Inhabitants of Conway*, 10 Allen, 528; *Dickinson v. Inhabitants of Conway*, 12 Allen, 487; *Kelley v. Lindsey*, 7 Gray, 287; *Railroad Nat'l Bank v. City of Lowell*, 109 Mass. 214.

It is clear that the school corporation can not be held responsible because of any acts done by the trustee in borrowing money and executing notes in the name of the school township; if responsible at all, it must be for some other reason, as such acts were in excess of his authority and entirely destitute of force as against the school corporation.

It is only in cases where there is a necessity for borrowing money, and where equity requires that the lender should be subrogated to the rights of the creditor whose debt was paid with the lender's money, that the school corporation is held liable. In this instance both these elements are wanting. There was no necessity for borrowing money, for the public revenues had supplied all that was needed. There is no equity, first, because the lender was bound to take notice of the extent of the authority of the trustee, and this imposed upon it the duty of ascertaining whether the public had supplied the needed funds; second, because the money lent was paid out upon the individual checks of the bank's depositor in the

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usual course of business, and without making any definite appropriation to any specific claim against the school township.

The principle that a decision on appeal governs the case throughout all its subsequent stages we fully recognize, but we do not understand it to be what appellee's counsel assert. In our judgment a decision rendered on appeal does not conclusively determine merely incidental or collateral questions, but determines only such questions as are presented for decision and are decided as essential to a just disposition of the pending appeal. The decision upon the sufficiency of a complaint does not determine the questions which subsequently arise on the evidence, unless such questions are in all material respects substantially the same as those presented by the evidence. But if counsel were right in affirming that the decision on the former appeal decides this case, they are radically wrong in their conclusion that it decides it in their favor. What that case does decide is, that the notes are void as against the school corporation, but that the sixth paragraph of the complaint was good because it averred that the money was borrowed for the purpose of paying the corporate indebtedness, and was actually applied to that purpose. The evidence is very far from showing such a case. It shows that there was really no corporate indebtedness, because the trustee had corporate funds, and shows, also, that the money was not, in contemplation of law, borrowed for the purpose of paying a corporate debt, and was not definitely appropriated to that purpose. It shows the contrary of what appellee asserts; for it shows that the only disposition made of the money was first to give credit to the depositor and then to pay it out, like all other money deposited, upon his individual checks in the ordinary course of business and without any definite appropriation to any specific purpose. The only debtor or creditor the bank ever had was Robinson, for it knew no one else and could not hold the corporation upon the void notes. A lender of money can not, after a course of dealing with an individual, change front and claim that he dealt with the cor-

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poration of which the individual was the special agent with naked statutory powers. In such a case, the agent who exceeds his powers may, in some cases, bind himself, but the corporation he can not bind. *Ballou v. Talbott*, 16 Mass. 461; *Potts v. Henderson*, 2 Ind. 327; *McHenry v. Duffield*, 7 Blackf. 41; *Johnson v. City of Indianapolis*, 16 Ind. 227.

It is true, as counsel assert, that there is no special finding, because the finding purporting to be one is not signed by the judge. We can not, therefore, decide the case upon what professes to be the special finding.

The evidence is in the record, and the motion for a new trial is in proper form, and we decide the case upon the ruling denying that motion. Appellee's counsel do, it is true, assume that there is a special finding, and mainly argue the case upon that erroneous assumption, but they have not waived the errors assigned upon the ruling on the motion for a new trial. In the concluding clause of their brief they refer to the specification of error founded on the ruling denying that motion and say: "As to the alleged error of the court in overruling the motion for a new trial, it would be uselessly trenching upon the time and patience of the court to argue it at length. It must be apparent to the court that the argument would necessarily be a recapitulation of what has already been said."

Judgment reversed, with instructions to grant a new trial.
Filed Jan. 27, 1885.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—We have again given the questions in this case careful consideration, and the result is that we are strengthened in the conviction that our conclusions heretofore announced were right.

We are clear that the trustee of a school corporation is a special agent of very limited authority. Not only is he a special agent, but he is also one whose authority is only such as a public statute confers upon him. This our decisions have

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often affirmed, as appears from the cases cited in our former opinion. That this conclusion is a just one can not be doubted by one who considers the nature of a school corporation and the character of the authority of its agent, the trustee. The corporation is itself organized for a limited and local purpose. it is not a corporation with general powers; it has neither the general power to contract debts nor to buy property. Its power is to conduct the local school affairs, and to do this with the money derived from the revenues set apart for school purposes. There is, in strictness, no power in the corporation to obtain or to expend money derived from any other source than the school revenues. *Wallis v. Johnson School Tp.*, 75 Ind. 368. Thus is the power of the corporation itself circumscribed, and its agent, the trustee, can by no possibility possess authority that is not possessed by his principal. It is perfectly obvious, therefore, that one who deals with a school trustee must, at his peril, ascertain that the trustee is acting within his authority. It is incumbent upon a person seeking to hold the corporation liable for a debt created by the trustee in the name of the corporation, to affirmatively show that it was one he had authority to incur. In this case this essential fact does not appear; for we think it too clear for argument, that where the trustee has funds of the corporation in his hands, he can not plunge it into debt. It is his duty, and his duty bounds and limits his authority, to apply the money of the corporation to payment for articles purchased for the corporation, and not to go into bank and borrow money in the name of the corporation. This the bank was bound to know, and it could not avoid knowing that at the time it lent money on the notes signed by its depositor as school trustee, he had school funds in his hands, for this information public records and the law made known. It was its duty to know that there were no school funds in his hands before it advanced him money. It follows from what we have said that, conceding that the money furnished Robinson was put in his hands by the bank to pay claims against the school

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township, still there can be no recovery ; but this is a concession not justified, for the money was placed directly to the credit of Robinson as an individual, and was so drawn from the bank by him. The money, therefore, was paid to Robinson directly, and went to his benefit as a depositor of the bank.

It needs no argument to prove that the school corporation, with no power to obtain money except from the public revenues set apart for that purpose, ought not to be charged with interest on money borrowed by its special agent when he has funds of the corporation in his hands supplied from the proper source. The law contemplates no such procedure. It is his duty to disburse the funds entrusted to him, and not to impose the burden of a debt upon the corporation.

It is true, that we have held that where the money received on notes executed in the name of the school corporation goes to pay for property received by it, the person advancing the money will be subrogated to the claim of the person who actually furnished the property, but we have steadily held that it is only in cases where the school corporation actually received the property purchased, that subrogation can take place. It is well known that subrogation arises, not by contract, but by force of equitable principles, and only in cases where good conscience requires that it should take place in order to prevent injustice. In this instance there is an entire absence of equity in the plaintiff. It can not be claimed with any tincture of reason, that the creditor of a special agent, with restricted and plainly defined statutory powers, can have an equity against a principal who has placed money in the hands of such an agent to pay all claims.

The evidence does tend to show, as claimed by counsel, that Robinson had no public money to his credit on the books of the bank, but this is very far from showing that he was not provided with funds from the public revenues. The question is not what money he had in bank, but what money of the public did he have in his hands?

There are, perhaps, some items which it is shown were paid

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on legitimate claims, and paid on the checks of Robinson as an individual to the holders of these claims; this, however, does not make out a case, for the facts still remain that Robinson was furnished with public money, and that all money obtained on the notes executed by him as trustee went to his individual credit. These facts lie across the road to a recovery. The bank did a general business with Robinson as an individual, and lent him money without proper inquiry as to his authority to execute the notes of the school township, and it can not recover without other evidence than that adduced.

It is a mistake to suppose that the school corporation was estopped by the statement of Robinson. He was not the corporation; he was merely its agent, and that, too, with limited statutory powers. *City of Valparaiso v. Gardner*, 97 Ind. 1 (49 Am. R. 416); *Strosser v. City of Ft. Wayne*, 100 Ind. 443, see page 449; *Axt v. Jackson School Tp.*, 90 Ind. 101; *Reeve School Tp. v. Dodson*, 98 Ind. 497.

It is a fundamental principle that a governmental corporation is not estopped by the act of an officer in cases where the act is beyond the scope of his authority.

Public corporations stand on an essentially different ground from private ones, and the rules which apply to the one class do not apply to the other in cases where the doctrine of *ultra vires* is invoked. *Driftwood Valley T. P. Co. v. Board, etc.*, 72 Ind. 226; *Cummins v. City of Seymour*, 79 Ind. 491, see page 497 (41 Am. R. 618). But the power of a school corporation is much more limited than ordinary public corporations, for there is no general power to incur debts or execute evidences of indebtedness, and, certainly, no such power exists where the school trustee is provided with money from the school revenues. The school corporation is, in truth, one of unusually limited powers, for the only source from which it can derive money is the school fund, or school revenues, and, strictly speaking, its only power is to receive and disburse the funds allotted to it. The authorities cited, in

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cases of actions against private corporations, are not applicable to public governmental corporations such as school townships.

We said, in our former opinion, that Robinson did not borrow the money for the specific purpose of paying claims against the corporation, and this we repeat after again reading the evidence. The money borrowed did go to Robinson as an individual, and the bank became his debtor for that money as its depositor. There is no evidence that the money was borrowed to pay any specific claim; on the contrary, it was placed to his credit and was held subject to his general check as an individual.

We said that no claim existed against the school corporation, and we were right. Where the school trustee has money of the corporation in his hands there can be no claim created by him by borrowing money. This the lender of money is, as the authorities cited abundantly establish, bound to know.

Counsel say that the question of the right to a new trial was not argued, but in this they are in error. We copied in our former opinion an extract from the brief of counsel for the appellant, showing that they did press this question. It is true they did not argue it at length, but they did make the question squarely. Their argument was mainly upon what the face of the record showed to be a duly signed special finding; but to have again argued the question on the motion for a new trial would have been to simply repeat what had been before fully and elaborately urged. The special finding, as it appears on the face of the record, seems to have been duly signed; but in return to a *certiorari* the original finding was sent to us, and from that it appears that there was no signature. Under such circumstances, it would be rank injustice to declare that there was no brief.

We acted upon the evidence deemed credible by the trial court, and this, as has many times been decided, is the rule of this court. *Gathright v. Burke*, 101 Ind. 590; *Julian v. Western U. Tel. Co.*, 98 Ind. 327; *Cain v. Goda*, 94 Ind. 555;

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Arnold v. Witt, 86 Ind. 367. We did not depart from the long established rule that we will not weigh evidence, but we took the evidence before us and found that in law it was not sufficient to entitle the appellee to a recovery. We simply applied the law to the evidence, and, as matter of law, decided that there could be no recovery.

Some technical objections are presented in the brief on the petition for a rehearing, but, under well settled rules, these come too late.

Petition overruled.

Filed Sept. 15, 1885.

No. 10,273.

CUNNINGHAM ET AL. v. THE EVANSVILLE AND TERRE
HAUTE RAILROAD COMPANY.

NEGLIGENCE.—Railroad.—Fire Caused by Locomotive.—Measure of Damages.—Where, by the actionable negligence of a railroad company, fire from its locomotive is communicated to adjoining property, which is thereby consumed, the owner of such property can recover his entire loss from such company without regard to any insurance thereon.

SAME.—Insurance Indemnity no Defence by Railroad Company.—In such case, the fact that such property at the time of its destruction was insured, and that the insurance companies had paid the owner the amount of the insurance, is not available to the railroad company as a defence.

PRACTICE.—Harmless Error.—An error of the trial court in ruling upon demurrers, which runs through the record and is repeated in instructions to the jury, is not a harmless error.

From the Knox Circuit Court.

W. H. De Wolf, S. N. Chambers, J. E. McDonald, J. M. Butler and *A. L. Mason*, for appellants.

A. Iglehart, J. G. Williams, F. W. Viehe, J. E. Iglehart and *R. G. Evans*, for appellee.

Howk, J.—This is a suit by the appellants, James H. and James A. Cunningham, as plaintiffs, against the appellee, the Evansville and Terre Haute Railroad Company, as sole de-

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fendant. The object of the suit was to recover damages for the destruction of the appellants' starch and glucose works by fire, communicated thereto, as alleged, by and through the negligence of the appellee, and without any contributory negligence on the part of the appellants. The complaint of the appellants was in three paragraphs. In the first paragraph, appellants alleged that the appellee negligently failed to keep its engines used on its railroad track adjacent to their works, supplied with suitable spark-arresters, but suffered them to become old, worn out and in bad repair, so that coals of fire escaped from such engines, and, without the appellants' fault, communicated to and destroyed their works.

In the second paragraph of their complaint, appellants alleged, in substance, that appellee negligently overloaded its trains of cars, used on its railroad track adjacent to the appellants' works, so that the engines hauling such trains emitted sparks and coals of fire, which, without appellants' contributory fault, communicated fire to their works, and they were thereby consumed and destroyed.

In the third paragraph of their complaint, appellants alleged, in brief, that by the general negligence of the appellee in the construction, management and use of its engines and trains of cars, sparks and coals of fire were suffered by appellee to escape from its locomotives, whereby appellants' starch and glucose works, without their fault, were set on fire and were burned and destroyed. A schedule of appellants' property, so burned and destroyed, is set out in each of the paragraphs of complaint.

The cause was put at issue and tried by a jury, and a verdict was returned for the appellee, the defendant below. Over the appellants' motion for a new trial, it was adjudged by the court that appellants take nothing by their suit, and that appellee recover its costs.

The first error of which appellants complain here is the overruling of their demurrers to the second, third and fourth paragraphs of appellee's answer.

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The answer was in five paragraphs, of which the first was a general denial of the complaint. The basis of each of the second, third, fourth and fifth paragraphs of answer is substantially the same, namely, that the appellants' starch and glucose works were insured against loss or destruction by fire, at the time they were burned, in divers named fire insurance companies, in the aggregate amount of \$50,000; and that after their works had been so burned and destroyed, upon proofs of their loss and an adjustment thereof, the appellants had actually received from such insurance companies the aggregate sum of \$35,224.09. Upon this basis of facts, the appellee alleged in the second paragraph of its answer, that the insurance money so received by the appellants was more than the value of the property so burned and destroyed, and more than the loss and damage sustained by them; that, by means of such payment of such insurance money, the several insurance companies became and were subrogated to all the rights of the appellants, in and to the property so burned and destroyed, and to all their rights of action for the destruction of such property, and to all the pretended rights which the appellants were seeking to enforce in this action; and so the appellee said that appellants were not the real parties in interest.

Upon the same basis of facts, the appellee alleged in its third paragraph of answer, that after the burning and destruction of their starch and glucose works, the appellants and the several insurance companies mutually settled, appraised and agreed upon the amount of such loss and damage complained of herein, at the sum of \$68,375.65, which was a sum greater than the damage suffered; that thereupon the several insurance companies paid, as and for the sum insured upon such property, the aggregate sum of \$35,224.09, whereby, all rights of action as to such sum became and were transferred to such insurance companies; and so the appellee said that, as to such sum, appellants could not maintain this action.

In its fourth paragraph of answer, upon the same basis of

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facts, the appellee alleged the appellants and the several insurance companies, after the burning and destruction of the starch and glucose works, agreed upon the value of such property and the amount of the loss, which latter was fixed at the highest limit and more than the same really was, to wit, at \$68,375.65; and that, upon such insurance and damage, the insurance companies paid the appellants the amount insured, to wit, \$35,224.09; whereby all right of action for the causes stated in the complaint herein became and were transferred to the several insurance companies, and appellants thereby became divested of all right of action for the causes set forth in their complaint.

It will be observed that the appellee has not controverted, in either of these paragraphs of answer, any of the facts stated by the appellants in either paragraph of their complaint, as constituting their cause of action. For the purposes of these paragraphs of answer the appellee concedes that the appellants' property was, without any contributory fault on their part, burned and destroyed by and through the fault and negligence of the appellee, (1) in failing to supply its engines with suitable spark-arresters; (2) in so overloading its trains of cars that the engines hauling the same emitted sparks and coals of fire; and (3) in the construction, management and use of its engines and trains, so that sparks and coals of fire were suffered to escape from its locomotives. Making these concessions, the appellee claimed that appellants' action against it for the damages resulting from its negligent destruction of their property (1) was wholly barred by reason of the fact that they had received from certain insurance companies, in which they had insured such property against loss by fire, certain sums of money, amounting in the aggregate to more than the value of their property so burned and destroyed, and to more than the loss or damages sustained by them, and (2) was barred in part as to the amount of the insurance money so received by them for the burning and loss of such property

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from such insurance companies, which was slightly in excess of one-half of the appraised and agreed value of the entire property so burned and destroyed.

The paragraphs of appellee's answer, the substance of which we have given, proceed upon the theory that although the appellants' property, without contributory fault on their part, was consumed and destroyed by and through the negligence of the appellee, they can not recover the damages occasioned by such destruction of their property of or from the appellee, if it appear they were indemnified for such damages by contracts of insurance against loss by fire, unless the amount of damages exceed such indemnity, and then only to the extent of such excess; in other words, the appellee claims in its answer, that, to the extent the appellants were indemnified for their damages resulting from the destruction of their property by fire by their contracts of insurance against loss by fire, it, the appellee, is exempt from liability to them for such damages, although the destruction of their property by fire was caused by and through its negligence, without their contributory fault. These positions can not be maintained. The contracts of the appellants for the insurance of their property, with the insurance companies, and their subsequent conduct in relation thereto, are matters in which the appellee, as the wrong-doer, had no concern, and which do not affect the measure of its liability. So the law seems to be uniformly settled elsewhere, and we know of no sufficient reason for adopting a different rule of decision in this State. *Weber v. Morris and Essex R. R. Co.*, 35 N. J. Law, 409 (10 Am. R. 253); *Clark v. Wilson*, 103 Mass. 219 (4 Am. R. 532); *Hayward v. Cain*, 105 Mass. 213; *Perrott v. Shearer*, 17 Mich. 47; *Merrick v. Brainard*, 38 Barb. 574; *Peoria M. and F. Ins. Co. v. Frost*, 37 Ill. 333; *Connecticut M. Life Ins. Co. v. New York, etc., R. R. Co.*, 25 Conn. 265; *Rockingham Mut. Fire Ins. Co. v. Boshier*, 39 Maine, 253; *Carpenter v. Eastern Transp. Co.*, 71 N. Y. 574.

The appellants claimed that their property had been con-

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sumed and destroyed by and through the actionable negligence of the appellee. In such a case they would be entitled to recover their entire loss from the appellee; and the fact that the insurance companies, in which their property was insured, had paid them the amount of such insurance, we think, did not constitute any defence whatever to the appellants' action. We are of opinion, therefore, that the trial court erred in overruling the appellants' demurrers to the second, third and fourth paragraphs of appellee's answer.

But it is claimed by appellee's counsel that even if the rulings of the court upon the demurrers to these paragraphs of its answer were erroneous, we ought to hold upon the entire record that such errors were harmless and worked no injury to the appellants. We do not think so. The error of the court in these rulings runs through the record, and, after the evidence is all in, is repeated in its instructions to the jury trying the cause. The jury were thus instructed by the court: "You will ascertain from the evidence the aggregate amount of the damage to the property named in the complaint. If such amount does not exceed the sum paid by the insurance companies, as above stated, you will return a verdict for defendant; if it does, you will ascertain the excess, and, having added six per cent. interest on such excess from the date of the fire until now, return a verdict for the plaintiffs for such excess and interest." This instruction, as we have seen, is not the law; but it was a repetition to the jury of the error of the court in its rulings upon the demurrers to the several paragraphs of appellee's answer. It will not do to say, we think, of such a continuing error running through the record, that it is a harmless error. At all events, common fairness seems to require that the appellants should, at least, have an opportunity to try their cause freed from such entangling errors.

In speaking of the claim of the wrong-doer to the benefit of insurance money received by the injured party, a recent writer on the law of damages says: "There can be no abate-

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ment of damages on the principal or partial compensation received for the injury, where it comes from a collateral source, wholly independent of the defendant, and is as to him *res inter alios acta*. * * * Nor will proof of money paid to the injured party by an insurer or other third person, by reason of the loss or injury, be admissible to reduce damages in favor of the party by whose fault such injury was done. The payment of such moneys not being procured by the defendant, and they not having been either paid or received to satisfy in whole or in part his liability, he can derive no advantage therefrom in mitigation of damages for which he is liable. As has been said by another, to permit a reduction of damages on such a ground would be to allow the wrong-doer to pay nothing, and take all the benefit of a policy of insurance without paying the premium." 1 Sutherland Damages, p. 242.

The doctrine here declared was recognized, approved and acted upon by this court, in *Sherlock v. Alling*, 44 Ind. 184. In that case, a similar defence was interposed to that pleaded by the appellee in the second, third and fourth paragraphs of its answer, in the case in hand. In considering this defence the court there said: "It proposes to use, as a defence to damages resulting from the wrongful act of the defendants, by way of set-off, recoupment, or in mitigation of such damages, pecuniary benefits received by the injured party, to which the defendants had not contributed, and not resulting from, or connected with, the act causing the death—benefits, which it is fair to presume would have been realized at a future day, without the aid of their wrongful act." So, in *Ohio, etc., R. W. Co. v. Dickerson*, 59 Ind. 317, it was held by this court that the fact that the salary of a person, injured through the negligence of the defendant, is paid by his employer during the time he is disabled by such injury, can not mitigate the damages such injured party may recover, in an action therefor.

In their exhaustive briefs of this cause, the appellants' learned counsel have ably discussed a number of alleged er-

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rors of law occurring at the trial and duly excepted to. But as these errors may not occur again, upon a new trial of this cause, we need not and do not extend this opinion in the consideration and decision of the questions thereby presented.

The judgment is reversed with costs, and the cause is remanded with instructions to sustain the demurrers to the second, third and fourth paragraphs of answer, etc.

NIBLACK, J., expressed no opinion in this case.

Filed June 25, 1885; petition for a rehearing overruled Sept. 23, 1885.

No. 11,994.

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WILL.—*Contingent Devise.*—*Intestacy.*—By one clause of her will a testatrix devised all of her property to her husband for life. Another clause provided that, "If my husband survive me, I desire at his death that all I may own or be possessed of shall go to and become the property of my well beloved step-daughter," naming her. These were the only dispositions of this property. The husband died before the death of the testatrix.

Held, that as to the property in question the testatrix died intestate.

From the Cass Circuit Court.

D. D. Dykeman and *D. C. Justice*, for appellant.

D. B. McConnell, *R. Magee* and *S. T. McConnell*, for appellees.

BLACK, C.—On the 13th of November, 1879, Ruth A. Burrow, then the wife of Joseph M. Burrow, with whom she resided at Logansport, in this State, executed her last will and testament, whereby she made dispositions of property as follows:

"*First.* I direct that all my just debts and funeral expenses shall be promptly paid, as soon as possible after my death.

"*Second.* I hereby bequeath and devise to my beloved husband, Joseph M. Burrow, all my property, both real and

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personal, of every description whatever, for and during his natural life.

“Thirdly. At the death of my said husband, should he outlive me, or as soon as may be after my death without the sacrifice of property, I desire that a suitable monument or monuments be put to all the graves; that they may be marked in an unostentatious manner: Harriet Farlow, who died January 30th, 1873; Mary Taintor, who died June 7th, 1873; Mahala Danforth, who died May 29th, 1879; Joseph M. Burrow and Ruth A. Burrow. The names may all be put on one monument if my executor and legatees are so disposed, and no use shall be made of my property or no income appropriated to personal use, until such monument or monuments shall be erected.

“Fourthly. If my husband survive me, I desire at his death that all I may own or be possessed of shall go to and become the property of my well beloved step-daughter, Harriet E. Gibson, now living in Lafayette, Indiana, subject to the provision of article third. If I survive my husband, all or anything I may become possessed of through his death I desire shall be divided equally between my step-son, John F. Burrow, and step-daughters, Aletta J. Baker and Harriet E. Gibson. I promised \$20 to the W. F. M. Society; I have only paid \$5. This I consider a debt, and desire paid; also, desire that a locket worth at least \$5 be purchased for my namesake, and my picture be put in it, Ruth A. Washburn, if I have not given it previous to my death.”

She appointed John F. Burrow as executor of said will. Her said husband died on the 17th of March, 1880, and she died on the 29th of July, 1880. Her said will was duly admitted to probate.

At the date of the execution of said will the testatrix was the owner in fee simple of certain real estate in Logansport, and she still owned it at her death. She was the second wife of her said husband, by whom she had no children.

This was an action for partition of said real estate, instituted

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by the appellee Charles E. Seymour, one of the heirs at law of said testatrix, against another heir at law and her step-children named in the will; and the question involved is, whether said real estate is the property of the appellant, said Harriet E. Gibson, or, as the court below decided, the property of the heirs at law of the testatrix.

By the second clause of the will the property in question was devised to the husband of the testatrix for his life. His death before that of the testatrix prevented the taking effect of this devise. By the second provision of the fourth clause she gave all the property of which she became possessed through his death to her step-children.

Other portions of the will directed the payment of her debts, the erection of a monument or monuments, the payment of what she had promised to the W. F. M. Society, and the purchase of a locket for her namesake; but the only disposition made of the real estate in question except to her husband for his life, was that contained in the first portion of the fourth clause, as follows: "If my husband survive me, I desire, at his death, that all I may own or be possessed of shall go to and become the property of my beloved step-daughter, Harriet E. Gibson, now living in Lafayette, Indiana, subject to the provision of article third."

This language is plain; its meaning is obvious. We are not at liberty to qualify or control such language in a will by conjecture or doubt arising from extraneous facts.

The devise of the real estate in question to the appellant is contingent in form, and no transposition of the language of the will, which does not modify the meaning, can be made so as to render the devise other than a contingent one.

We may conjecture that the testatrix failed through inadvertence to express her intention as she would have done if her attention had been called by another person to the matter about which the parties to this suit are now through it contending. But courts can no more make a portion of a will than they can make an entire will.

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We can not say that the testatrix by her will gave the real estate in question to the appellant in fee simple merely subject to the life-estate previously given to the husband of the testatrix. She plainly made the devise of this real estate to the appellant contingent upon an event which did not happen.

She made no expression of intention in regard to this property in the event that she should survive her husband; and there is nothing left for us but to conclude, with the court below, that as to this property she died intestate.

PER CURIAM.—Upon the foregoing opinion, the judgment is affirmed, at the costs of the appellant.

Filed April 25, 1885.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—We have carefully studied the briefs originally filed and those filed on the petition for a rehearing, and can not find any reason for departing from the rule declared in our former opinion.

The rights of the appellant to the property she claims depend upon the construction of the will of her step-mother, Ruth A. Burrow. The will, set out in our former opinion, devises to the appellant's father and the testatrix's husband an estate for life in her property, makes provision for the payment of debts, for the erection of monuments, and for the appointment of an executor. The only provisions in the will which directly affect the appellant are the following:

"*Fourthly.* If my husband survive me, I desire at his death that all I may own or be possessed of shall go to and become the property of my well beloved step-daughter, Harriet E. Gibson, now living in Lafayette, Ind., subject to the provision of article third. If I survive my husband, all or anything I may become possessed of through his death I desire shall be divided equally between my step-son, John F. Burrow, and step-daughters, Aletta J. Baker and Harriet E. Gibson."

If it were not for the earnestness and apparent sincerity of counsel, we should not feel justified in devoting additional

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time or space to the question, for, to our minds, it is clear that the provisions of the will are not doubtful or obscure. In one event only is Harriet E. Gibson to take the property of her step-mother, the testatrix, and that is in the event that the husband of the testatrix should survive her. We can not inquire why the step-mother chose to make the devise to her step-child depend upon the contingency of the father's survival. It is not the duty of the courts, nor is it within their power, to search for the reasons which influenced a testator to annex a condition to a devise; their duty is to ascertain whether there is a contingency, and its character and effect. The devise to Mrs. Gibson is made to depend upon the contingency of her father outliving his wife, and the courts can not destroy the force of a clause so clearly and fully framed as the one before us.

There is no absolute devise to Mrs. Gibson, and unless the court inserts such a devise in the will, she can not take the property of the testatrix. Not only is there no absolute devise, but there is a conditional one, and the contingency is the event of the survival of the husband of the testatrix. It is a familiar rule that the express mention of one thing implies the exclusion of all others, and under this rule it must be held that expressly making the devise depend upon the happening of a given event excludes the inference that the devise was intended to be an absolute one.

Mrs. Gibson can only take as the will provides, and as the will makes the devise depend upon a contingency, she can not take absolutely. She can claim only under the will, for she is not an heir, and can take only upon the condition expressly created by the will, and as that condition failed, so, also, did her claim as sole devisee.

We are bound to adhere to the words of the will unless there is doubt, confusion or obscurity, and there is nothing of the kind here. Redfield says there is no rule of construction "of more universal application, both here and in England, than that the plain and unambiguous words of the

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will must prevail, and are not to be controlled, or qualified, by any conjectural, or doubtful constructions, growing out of the situation, circumstances, or condition, either of the testator, his property, or his family." 1 Redf. Law of Wills, p. 430.

Another author says: "Devises, limited in clear and express terms of contingency, do not take effect, unless the events upon which they are made dependent happen." 1 Jarman Wills (4 Am. ed.), p. 743.

At another place this author says: "An estate will be construed to be contingent, if clearly so expressed, however absurd and inconvenient may be the consequences to which such a construction may lead, and however inconsistent with what may be conjectured would have been the testator's actual meaning, if his attention had been drawn to these consequences." 1 Jarman Wills, p. 744.

The authorities are not divided upon the proposition that courts can not, except in the clearest cases, change by transposition, alteration, subtraction or substitution, the words of a will, but must take them as they are written. *Shimer v. Mann*, 99 Ind. 190, see auth. cited pp. 195, 196 (50 Am. R. 82); *Rupp v. Eberly*, 79 Pa. St. 141; *Yearnshaw's Appeal*, 25 Wis. 21.

The language of the will gives Mrs. Gibson the whole estate only upon the condition that the husband of the testatrix survives her. No precise form of words is necessary to create a condition. As said in *Stilwell v. Knapper*, 69 Ind. 558 (35 Am. R. 240): "The word 'condition' is not necessary to the creation of a condition. Any words that convey the proper meaning will create a condition;" see page 570. There are many cases illustrating this general doctrine and applying it to cases like the present. In the well considered case of *Yearnshaw's Appeal*, *supra*, the question was considered and decided as we have decided it.

In the case of *Illinois Land and Loan Co. v. Bonner*, 75 Ill. 315, it was said: "Did Bogle and Trulear take anything under the will? We are of the opinion they did not for the rea-

son that the contingency upon which they were to take never happened. They were to take only 'in case both said sister and brother should die without issue prior to attaining the ages of eighteen and twenty-one respectively.' The sister and brother did both die without issue, but they did not both die prior to their attaining those ages respectively. One did, and the other did not, the brother dying before reaching the age of twenty-one, but the sister, not until after having reached the age of eighteen. The terms of this devise over are clear, and free from the least ambiguity. It seems plain that the devise is contingent upon the fact of both Rosalie and Percy dying before reaching the ages of eighteen and twenty-one respectively. * * * The testatrix did not in her will provide for the events that have happened, that is, of her sister dying over eighteen and the brother under twenty-one. In such case, the court will not provide for the unforeseen events. 'Where the testator, in the disposition of his property, overlooks a particular event, which, had it occurred to him, he would in all probability have provided against, the court will not rectify the omission by implying or inserting the necessary clause; conceiving it would be too much like making a will for the testator, rather than construing that already made.'" 2 Roper Legacies, p. 1464.

We have perhaps cited more authorities upon this branch of the discussion than necessary, but we have been induced to do so by the zeal and earnestness of counsel.

Counsel for appellants complain that their authorities were not discussed, and infer that they were not considered. Their inference is erroneous; it does not follow that because authorities are not discussed in detail, in the opinion, that they have not had consideration.

Many authorities are cited to the effect that courts must ascertain and give force to the intention of the testator, and we yield undoubting assent to this familiar and rudimental doctrine, but we can not perceive that it aids counsel, for all the authorities agree that the intention is to be gathered from

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the language of the will; that it must be the testator's intention as thus manifested that is given effect, and not the views of the court as to what the will should have provided, and that the court can not supply words to give the instrument a different meaning from that which the language used ordinarily conveys.

It is contended that the intention of the testatrix was to make a disposition of her entire estate, and, therefore, that she intended to make an absolute devise to Mrs. Gibson. There is in this argument a plain fallacy; the conclusion does not follow from the premise, and the premise is not well assumed. The words of the will give an estate to Mrs. Gibson on a contingency, and not otherwise, and it can not be assumed that the testatrix meant the reverse of what she says. Granting, however, the justice of the assumption, the conclusion does not follow, because the intention was not to dispose of the estate to Mrs. Gibson, except upon a certain event, and the inference is that what was not so disposed of went to the heirs. *Waugh v. Riley*, 68 Ind. 482. The presumption in such a case as this is in favor of the heirs, and where an estate is devised to a stranger upon a contingency, the contingency must happen, or the heirs will succeed to the estate of their ancestor. The general rule upon this subject is thus stated: "It is a well known maxim, that an heir at law can only be disinherited by express devise or necessary implication, and that implication has been defined to be such a strong probability that an intention to the contrary can not be supposed." 1 Jarman Wills, 465; *Rupp v. Eberly*, *supra*.

We are referred to the cases of *Allen v. Mayfield*, 20 Ind. 293, *Richmond v. Vanhook*, 3 Iredell Eq. 581, *Dunlap v. Dunlap*, 4 Desaussure, 305, *Coleman v. Hutchenson*, 3 Bibb, 209, in support of the proposition, that "a legacy to one person for life with remainder to another does not lapse upon the death of the first taker during the testator's life," but these cases, it is evident, can not exert any influence here, for the question is not whether the devise to the husband lapsed,

but whether the contingency upon which Mrs. Gibson was to take ever happened?

We are asked to construe the will "as if Joseph M. Burrow," the husband, "had not been named," but this we can not do, for the words of the will are: "If my husband survive me, I desire at his death that all I may own or be possessed of shall go to and become the property of my well beloved step-daughter, Harriet E. Gibson." To strike out the provision creating the contingency would make the will express a meaning entirely different from what its framer intended. The case of *Jackson v. Hoover*, 26 Ind. 511, is essentially different from the present, for there the persons who claimed the estate were the children of the testator, it appeared that he meant to make provision for them all, and there was no language creating a condition as there is here.

The case of *Womrath v. McCormick*, 51 Pa. St. 504, is not in point. There the question was whether the remainder was vested or contingent, there was no question as to whether the devise was, or was not, a conditional one. The decision was put upon the doctrine of Mr. Fearne, that "It sometimes happens that a remainder is limited in words which seem to import a contingency, though in fact they mean no more than would have been implied without them, or do not amount to a condition precedent, but only denote the time when the remainder is to vest in possession." Here no estate at all is devised except upon condition that the husband shall survive the testatrix. The question is not when a remainder shall vest, but whether, if the designated contingency does not happen, there is any devise at all. Redfield defines a conditional devise thus: "A conditional bequest is where its taking effect or continuing in operation depends upon the happening or not happening of some uncertain event." 2 Redf. Wills, 283. This describes the devise contained in the will under examination, for the taking effect of the bequest depends upon the contingency of the husband of the testatrix surviving her.

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The will does not, as is argued, simply fix the time when the devise shall take effect, but it provides that it shall not take effect at all until the happening of the designated contingency. Until that contingency does happen no estate passes. A standard author says: "Whenever it appears that the happening of an event, or the performance of an act, was intended to operate as a condition to precede the vesting of a legacy or devise, it is essential that the event happens, or the act is done, since no interest will previously vest in the legatee or devisee, as has been shown in the tenth chapter of this treatise." 1 Roper Legacies, 750. 2 Powell Devises, 251. Petition overruled.

Filed Sept. 23, 1885.

No. 11,777.

HODGES v. BALES.

SEDUCTION.—Complaint.—Previous Chastity.—Reliance on Promises.—Averments of previous chastity, or good repute for chastity, and that the plaintiff relied on the defendant's promises, are not essential in a complaint by an unmarried woman for her own seduction.

SAME.—Averments as to Means of Seduction.—A complaint alleging, substantially, that the defendant was the plaintiff's suitor, and that by his attentions and professions of affection he gained her confidence and importuned and persuaded her to have sexual intercourse with him, and that she, by reason of her confidence in and love for him, yielded, etc., and, also, that by promising to marry plaintiff the defendant seduced and debauched her, sufficiently describes the means of the seduction.

SAME.—Coercion.—Demurrer.—That it remains uncertain from a paragraph of complaint, whether the intercourse was had by means of force or by arts which amount to seduction, or both combined, is not ground for demurrer.

SAME.—Evidence.—For a consideration of evidence held sufficient after verdict to support a charge of seduction, notwithstanding an element of coercion, see opinion.

INSTRUCTIONS TO JURY.—That a single instruction, standing alone, is subject to criticism, is not ground for reversal, if, upon the charge as a whole, the law is correctly stated to the jury.

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102 494
165 442

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JURY.—*Misconduct of.—Practice.*—Where the trial court hears affidavits and counter-affidavits upon a charge of misconduct of the jury, its decision, if supported by evidence, will not be disturbed.

SAME.—*Competency of Juror.—Relationship to Party.—New Trial.*—The fact that a juror's first wife, who had been dead twenty years or more, was a second cousin of a party to the action, which fact the juror did not know when he agreed to the verdict, is not a sufficient cause for a new trial.

WITNESS.—*Corroboration of by Previous Statements.*—A witness who has been merely contradicted as to an alleged fact testified to by him can not be corroborated by showing that he related the same fact in the same way before.

From the Morgan Circuit Court.

G. W. Grubbs, M. H. Parks, J. H. Jordan, O. Matthews, L. Ferguson and C. G. Renner, for appellant.

G. A. Adams, J. S. Newby, W. R. Harrison and W. E. McCord, for appellee.

MITCHELL, C. J.—This action was brought by Mary M. Bales against the appellant to recover damages for her seduction.

The complaint was originally in four paragraphs. Pending the action an additional paragraph was filed.

Separate demurrers were filed to the first, second, third and fourth paragraphs. The demurrer was sustained to the third and overruled to the first, second and fourth, and the overruling of the demurrer to these paragraphs is the first error assigned.

The objections which counsel make to the first paragraph are, "that the means therein alleged are not sufficient to constitute seduction, nor is there any allegation in this paragraph to show that the woman was drawn aside from the path of virtue, which she was herself pursuing, or that she relied upon the means and promises made by the defendant." The only objection stated to the second is, that it is alleged therein "that she was coerced and compelled to submit to the carnal intercourse with the defendant." All that is said of the fourth is that it is similar to the second, and that it is bad for the same reasons.

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In each of the foregoing paragraphs it is averred, in substance, among other things, that the plaintiff is an unmarried woman; that the defendant was her suitor, and by his visits and attentions to and professions of love and affection for her, gained her confidence, and importuned and persuaded her to have sexual intercourse with him, and that she, by reason of her confidence in and love for him, yielded to his importunities, and that pregnancy and the premature birth of twins was the result.

The first and fourth paragraphs each contain, in addition to the foregoing averments, an averment of a promise of marriage, and that "by reason of said promises aforesaid, * * and by then and there undertaking and promising to marry," the defendant seduced and debauched her.

In the second and fourth paragraphs are contained, in addition to the other means alleged to have been used, averments, in effect, that the defendant coerced and compelled her to submit to sexual intercourse with him. It is not averred in either paragraph that the plaintiff was previously chaste, or of good repute for chastity.

An averment of previous chastity, or good repute for chastity, is not essential in a complaint by an unmarried woman for her own seduction. This was directly ruled in *Bell v. Rinker*, 29 Ind. 267. It was not necessary that the means used should have been more particularly described, nor was it necessary to aver that the plaintiff relied on the defendant's promises. *Hart v. Walker*, 77 Ind. 331; *Rees v. Cupp*, 59 Ind. 566.

That the second and fourth paragraphs contained averments, that, in addition to the other means used, the intercourse was had by means of coercion and compulsion, did not make them subject to demurrer. We agree with appellant's counsel that seduction can not be accomplished by force alone, but the other averments, with which those objected to are coupled, make a case of seduction. If the arts and wiles set out were employed to gain the plaintiff's confidence, and her

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consent was finally obtained through persuasion and force combined, we are not prepared to say that this would not be seduction. That it remains uncertain whether the intercourse was had by means of force, or by arts which amount to seduction, or both combined, was not a ground for demurrer. There was no error in overruling the demurrer to these paragraphs of the complaint.

It is assigned for error that the court erred in overruling the appellant's motion for a new trial, and the first point urged under this assignment is that the evidence does not sustain the verdict. It is insisted that if the plaintiff's account of the matter be accepted as true, it makes a case of rape, and not of seduction.

The substance of the plaintiff's testimony was, that the defendant had been her suitor; that he solicited her in marriage; that she had consented; that he had asked her to wait for him; that on account of his mother he could not then marry; that defendant's mother was an aged, palsied invalid and in infirm health, and that he and his mother composed the family at that time; that he procured plaintiff to come and live with his mother, to nurse and care for her; that soon after she went to care for his mother and household, he came to her bed, in the room occupied by the invalid mother, while she was asleep at night, and carried her bodily across the hall to his own room in her night-clothes; that she resisted, and he compelled her to stay, locking the door, and refusing to let her go. She testified that he tried to persuade her to yield to him by telling her he would marry her if any trouble resulted; he also told her he would have his brother, Perry, move into the house and take care of his mother, and he would marry her in any event. She refused consent and struggled to get away, and he held her fast. She tried to make an outcry, but could make no one hear. She tried to get his arm loose but could not, and finally, worn out between entreaty and force, she submitted. The plaintiff testified that

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the defendant had intercourse with her on other occasions, and adds, that it was always against her will. The defendant denied having had any sexual intercourse at all with plaintiff.

Over an instruction which told the jury, in substance, that if they believed from the evidence that the plaintiff yielded to the defendant on account of force or coercion, they should find for him, the jury nevertheless found for the plaintiff. We can not say that the evidence does not support the verdict. We do not mean to say that an ordinary complaint for seduction alone would be supported by proof of intercourse had under compulsion without any promises or persuasion, such as would constitute seduction, but the complaint in this case, taking all its allegations together, combines an action for damages for seduction with one for assault and battery and resulting injury. Although neither paragraph of the complaint was, on that account, subject to a general demurrer, the defendant might, perhaps, had he chosen, have required the plaintiff to state her several causes of action in separate paragraphs, but with his consent the whole was tried together, and we think he can not now complain. Assuming the facts testified to by the plaintiff to be true, she might have maintained an action for the injury in either form. Besides, taking the testimony as we find it, we are of opinion that it supports the charge of seduction, notwithstanding the element of coercion found in the plaintiff's account of the affair. Taking it as true, that the defendant, as suitor, had won the confidence and affection of the plaintiff; that he had been accepted as her prospective husband; that although carried bodily to and detained in his room by force, his pledges of fidelity to her were then repeated and renewed, we can not now undertake to separate and determine the effect which these promises and persuasions may have had in inducing her to yield assent to the wishes of one in whom she confided. Presumably, if no relations of confidence had existed between them, he would have entered upon no such bold adventure,

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nor would she so readily have become a victim to be carried off in that fashion.

Error is also predicated upon instructions given by the court. Without undertaking to go over the instructions in detail, it is sufficient to say that after a careful examination of all of them, we are of opinion that the law of the case was fairly stated to the jury by the court. That a single instruction standing alone may be justly subject to criticism is not ground for reversal if, upon considering the charge as a whole, the law is correctly stated to the jury. Judged by this standard the appellant has no cause to complain.

Complaint is also made that some of the instructions asked by the defendant were modified by the court, but in the condition in which we find the record we are unable to determine what modifications were made of the instructions asked.

The learned counsel for appellant, in their brief, discuss numerous alleged instructions refused, under an evident misapprehension of the record. We are referred to instructions supposed to be found on pages 64 to 75 of the transcript. Upon examination of the record we find the pages of the transcript numbered consecutively from 1 to 61, following which is page 76, leaving a hiatus from 61 to 76. We find no instructions in the record except those given by the court.

It is next claimed that error intervened on account of misconduct of the jury: 1. In leaving the jury-room, with the consent of the bailiff, and going into the court-room during the recess of the court, where the papers and pleadings in the cause and law-books were lying on the table. 2. In permitting the bailiff to remain in the jury-room with them during their deliberations. 3. In going into the sheriff's office while they were deliberating on their verdict, and looking out of the window. 4. In arriving at their verdict by lot.

Upon all these questions the court below heard the affidavits imputing the alleged misconduct, and also heard the testimony of the bailiff and some of the jurors in denial of the

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inculpatory facts imputed to them, and upon such hearing decided in favor of the regularity of the conduct of the jury. The rule is that when, upon such inquiry, the decision of the court is, as it is in this case, supported by evidence, it will not be disturbed. *Epps v. State*, post, p. 539, and cases cited.

It is next contended that the court erred in excluding certain evidence, which was proposed on behalf of the appellant by the witnesses Manly and Vandeventer. Manly had testified on behalf of the appellant that about four years before the alleged seduction he had seen the plaintiff and her cousin, Joseph Bolin, a young man, lying in a fence corner in an orchard, and that when they saw him they jumped up and looked confused. One Bateman Bolin was called as a witness on plaintiff's behalf, and testified that he was present at the alleged occurrence; that plaintiff and his brother Joseph were out in the peach orchard getting peaches on the occasion referred to, and were not in a fence corner, nor lying down, and that he and Manly went out to the orchard together, and that nothing of the character testified to by Manly occurred. The defendant then proposed to prove by Manly and Vandeventer that within a week after the alleged occurrence, Manly had related it to Vandeventer substantially as he had testified on the stand. Upon objection the testimony of both was excluded, and we think properly.

Where a witness is impeached by showing that he has made statements out of court in conflict with those made in court, he may be corroborated by showing that he has also made statements in harmony with his testimony. *Coffin v. Anderson*, 4 Blackf. 395; *Brookbank v. State, ex rel.*, 55 Ind. 169. We know of no rule, however, which authorizes the corroboration of a witness who has been contradicted as to an alleged fact testified to by him, by showing that he related the same fact in the same way before. If it had been shown in impeachment of him that he had related the same fact differently, then within the rule it might have been shown in cor-

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roboration that he also related it consistent with his testimony. *Carter v. Carter*, 79 Ind. 466.

While the jury were being impanelled, one William D. Hastings was called and accepted as a juror. On his *voire dire* he testified that he was not related by blood or marriage to the plaintiff. After the verdict was returned the defendant, with his motion for a new trial, presented an affidavit, in which he alleged that he was surprised by the fact, that he had learned since the jury was impanelled that a deceased wife of Hastings was a second cousin of the plaintiff, and that he was influential in behalf of plaintiff on the jury. This was assigned as a cause for a new trial. The affidavit of Hastings was received, in which it was shown that his first wife's maiden name was Baker; that she had died in 1862; that he had learned since the return of the verdict that his deceased wife and the plaintiff were second cousins, and that the fact was not known to, and had no influence upon, him. The point merits no further consideration.

Finally, it is contended that the testimony of the plaintiff bears upon its face the impress of improbability; that she was shown to have indulged in vulgar speeches and songs, indelicate and imprudent conduct; that her reputation for chastity was not above suspicion, and much more to her discredit, and that as the verdict, so far as respects the fact of seduction and intercourse, rested on her unsupported testimony, which the defendant positively denied, the appellant has on the whole suffered wrong.

Looking at the testimony of the defendant, and that given in his behalf, and this view would seem to be reasonably well supported. The fact remains, however, that it was proved, and not denied by the defendant, that he was frequently her escort in public places; that to some extent at least he sought her society, and was regarded as her suitor. She was entrusted with the care of his invalid mother. Many witnesses testified to her good reputation, and that no ill was ever spoken of her until she became involved in the ruin suffered

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by the wrong of some one. Against the defendant's positive denial stood her explicit statement that he was the author of her misfortune, and a jury of their own selection, directed by a careful and intelligent judge, believed her rather than him. That there was occasion for such an investigation is to be deplored. The occasion having arisen, and the investigation had, before a tribunal fitly adapted to ascertain the truth, we can not, in view of all the evidence, disturb the conclusion there reached.

The judgment is affirmed, with costs.

Filed June 17, 1885; petition for a rehearing overruled Sept. 17, 1885.

No. 12,297.

WALKER v. THE STATE.

CRIMINAL LAW.—*Competency of Juror.*—*Opinion as to Guilt or Innocence.*—

Conversations with Witnesses.—An opinion formed from conversations with "witnesses of the transaction" absolutely disqualifies a person from serving as a juror in a criminal cause, but this disqualification applies only to opinions formed from conversations with witnesses to the transaction constituting the *gravamen* of the offence charged, and not to opinions based upon conversations with witnesses to some merely incidental or collateral matter connected with the trial.

SAME.—*Discretion of Trial Court.*—The judge who presides at the trial should be permitted to exercise a large discretion in determining the weight and relative importance which should be given to the answers of a juror to questions touching his qualifications to serve.

SAME.—*Evidence.*—*Family Relations of Deceased, etc.*—*Presumption.*—Where, in a prosecution for murder, a witness testifies to his relationship with the deceased, and also to the family relations and business of the latter, it will be presumed by the Supreme Court, in the absence from the record of the evidence in connection with which such proof was made, that the testimony was properly admitted.

SAME.—*Previous Moral Character of Defendant.*—In a prosecution for murder, evidence that the previous character of the defendant for peace and quietude was good is admissible, but his previous moral character is not a proper subject of inquiry.

SAME.—*Difficulty between Deceased and Third Person.*—Evidence that a third

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person, a short time previous to the homicide, had a difficulty with the deceased, and asked the defendant for his revolver to use upon him, which defendant refused, was properly excluded.

SAME.—Immaterial Evidence.—Practice.—Where offered evidence seems from the record to have been immaterial, it will be presumed that the trial court properly excluded it.

SAME.—Insanity.—Can not be Proved by Reputation.—Insanity is a fact which can not be proved by reputation.

SAME.—Partial Insanity.—Instructions.—For instructions on the subject of partial insanity see opinion.

SAME.—Instructions, How Considered.—Practice.—An instruction must be considered as a whole and not in its separate parts, and also in connection with all the other instructions, if any, given at the same time.

SAME.—Refusing Instructions Asked.—It is not error to refuse to give instructions asked when those given by the court sufficiently cover the subject.

SAME.—Where Cause is on Trial and Undisposed of at End of Term Court May Sit Beyond Term.—Under section 325, R. S. 1843, continued in force as section 1379, R. S. 1881, where a cause is on trial and undisposed of at the end of a regular term of court, the court may continue its sitting beyond such term until the cause is fully disposed of.

SAME.—Adjournment Before Midnight.—Practice.—Where at six o'clock on Saturday evening, the last day of a term of court, it is made to appear that the cause can not be disposed of in the six hours remaining of such term, it may be adjourned over until the following Monday, without holding until midnight.

SAME.—Imperfect Record.—Amendment Nunc Pro Tunc.—The power to amend imperfect records of past proceedings extends to criminal as well as to civil proceedings.

SAME.—Appeal.—Practice.—Where, after appeal, the record is found to be imperfect, and proceedings are begun in the trial court for its amendment *nunc pro tunc*, there must be an appeal from the order making the amendment to bring in review the sufficiency of the evidence to sustain it.

SAME.—Notice to Defendant in Prison.—Notice to a defendant while in prison, on conviction of manslaughter, of proceedings by the State to obtain a *nunc pro tunc* entry amending the record, is, from the necessity of the case, sufficient.

From the Wells Circuit Court.

J. S. Dailey, L. Mock, J. R. Coffroth and T. A. Stuart, for appellant.

F. T. Hord, Attorney General, E. C. Vaughn, Prosecuting Attorney, and W. B. Hord, for the State.

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NIBLACK, J.—This was a prosecution against William Walker, the appellant, for the murder of George Shaw. The indictment charged murder in the first degree. A jury found the appellant guilty of voluntary manslaughter, and fixed his punishment at imprisonment in the State's prison for twenty-one years. After overruling motions for a new trial and in arrest of judgment, the circuit court caused judgment to be entered upon the verdict.

Many alleged errors in the proceedings below are relied upon here for a reversal of the judgment thus entered upon the verdict.

One John Newhouse, being called as a juror, was examined upon his oath touching his qualifications to serve in that capacity. In response to questions addressed to him by counsel, he stated that he had heard of the charge made against the appellant, and knew what it was; that he had both formed and expressed an opinion concerning the guilt or innocence of the appellant; that this opinion was formed from newspaper reports, from common talk in the neighborhood, and from talking with witnesses, but not with eye-witnesses to the transaction; that the opinion he had formed had made a deep impression on his mind; that the impression thus made might have some influence upon him in making up a verdict; that he thought it probably would; that he supposed it would require more evidence in some respects, and less in others, to influence his judgment, than it would if he had formed no opinion concerning the case. Counsel for the appellant then challenged Newhouse for cause, whereupon the court inquired of him whether, notwithstanding the opinion he had formed, he could hear the evidence which might be offered, and render a fair and impartial verdict in the cause according to the law and the evidence, to which he answered promptly in the affirmative. The court, accepting this answer as sufficient, held that Newhouse was a competent juror, and permitted him to be sworn and to serve as such at the trial of the cause.

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It is argued that inasmuch as Newhouse had talked with witnesses in the cause, the objection to his competency was much stronger than any of the objections made to certain jurors in the case of *Stout v. State*, 90 Ind. 1, and that he was thereby rendered absolutely incompetent to serve as a juror in the cause.

It is true, that an opinion formed from conversations with "witnesses of the *transaction*" does absolutely disqualify a person from serving as a juror in a criminal cause. This is the fair inference from the peculiar provisions of section 1793, R. S. 1881, and from our holding in the case of *Dugle v. State*, 100 Ind. 259. But this peremptory disqualification applies only to opinions formed from conversations with witnesses to the transaction constituting the *gravamen* of the offence charged, and not to opinions based upon conversations with witnesses to some merely incidental or collateral matter connected with the trial. Although Newhouse seems not to have been specifically interrogated on the subject, we infer from what he did say that the witnesses with whom he had held conversations were not "witnesses of the transaction" within the meaning of section 1793 of the statutes above referred to. While, therefore, the answers of Newhouse carried him very closely up to the line of peremptory disqualification, a margin was nevertheless left for the exercise of a judicial discretion, and nothing is shown which would justify the conclusion that admitting him to serve as a juror was an abuse of the discretion with which the court was, under the circumstances, invested. *Butler v. State*, 97 Ind. 378.

Persons called to serve as jurors are often confused by the incisive and inquisitorial nature of the questions addressed to them touching their qualifications to act in that capacity, and, under a confusion thus induced, frequently give inconsistent, and even incoherent, answers. It is, consequently, both just and reasonable that the judge who presides at the trial should be permitted to exercise a large discretion in deter-

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mining the weight and relative importance which should be given to such answers.

The State was permitted to prove at the trial that one Henry Barchman was a brother-in-law of George Shaw, the deceased; that the deceased had a wife and two children, who then lived in Missouri; also, the business in which the deceased was engaged. It is contended that the admission of this evidence was injurious to the appellant, as its tendency was to arouse a sympathy in the minds of the jury in favor of the family of the deceased.

The evidence is not all in the record. We have only such parts of the evidence before us as are supposed to have some bearing upon certain questions reserved at the trial, and as are contained in special bills of exceptions. There is nothing in the record which fully explains Barchman's relation to the cause, but we infer that he was a witness either for the State or the appellant. Assuming that he was a witness at the trial, his relationship to the deceased, or his family, may have become a proper, if not a material inquiry. So, too, in determining the motives by which a party was presumably governed, as well as in making an intelligent application of all the evidence, it often becomes important to know his occupation, his place of residence, his family relations, if any, and his general surroundings. *Bersch v. State*, 13 Ind. 434; *Fahnestock v. State*, 23 Ind. 231. In the absence, therefore, of the evidence, in connection with which the foregoing proof was made, a presumption in favor of the proper admissibility of such proof will be indulged by this court.

The appellant called witnesses to prove that his general moral character was good previous to the alleged homicide, but he was not allowed to introduce evidence on that subject, and that ruling is also complained of here.

Evidence that the previous character of the appellant for peace and quietude was good would have been admissible, but the previous moral character of the appellant was not a proper subject of inquiry in a case like this. That was settled by

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the case of *State v. Bloom*, 68 Ind. 54 (34 Am. R. 247), and the rule there asserted has not been changed by the subsequent legislation permitting the general moral character of a witness in a criminal cause to be inquired into. See, also, Whart. Crim. Ev., section 60.

The appellant also offered to prove by one Milliken, that he, Milliken, had a difficulty with the deceased a short time before the homicide, and that he thereupon appealed to the appellant for the loan of his revolver to use upon the deceased; that the appellant declined to loan his revolver to Milliken, and that proof was also excluded. No argument is offered as to the relevancy of the proof thus proposed, and we know of no ground upon which its admissibility could be maintained.

The appellant proposed to prove by his father, Alexander Walker, that it was commonly reputed in the family that his, the witness's, grandfather, and one of his uncles, were insane, but the court held that such proof was inadmissible, and a question was reserved upon the exclusion of that evidence.

Evidence of the kind proposed as above was held to be admissible by the case of *State v. Windsor*, 5 Harrington, 512, and that case is quoted from and cited approvingly by Rogers on Expert Testimony at section 60, but we regard the decided weight of authority as against its admissibility.

In the case of *State v. Hoyt*, 47 Conn. 518, it is announced, without reservation, that insanity is a fact which can not be proved by reputation; and to the same effect see *Ashcraft v. De Armond*, 44 Iowa, 229, *Foster v. Brooks*, 6 Ga. 287, *Choice v. State*, 31 Ga. 424. See, also, 2 Greenl. Ev., section 371, and *Baxter v. Abbott*, 7 Gray, 71.

In rebuttal one Purseley testified on behalf of the State, that he was at the appellant's house on the evening after the homicide, when the appellant returned home; that the appellant, finding his wife crying, rallied her for her weakness, and said, "You know they have been running over me, and I can't stand it," to which she replied "I know it." The ap-

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pellant, in rebuttal on his part, called witnesses, who claimed to have been at the appellant's house at the time referred to, and offered to prove by them that no such conversation as that testified to by Purseley occurred between the appellant and his wife at that time, but the court would not permit the proposed proof to be made, and that decision is here complained of as erroneous.

The alleged conversation between the appellant and his wife was put in evidence as an event happening after the homicide, and there is nothing in the record indicating what was intended to be rebutted by proving that such a conversation took place. There is, consequently, nothing before us showing, or tending to show, that the conversation in question had any material application to anything which had preceded its introduction in evidence, or was in any way material to the merits of the prosecution against the appellant. It may have been on account of its immateriality that the court refused to hear further rebutting evidence, and in that respect all the presumptions go in favor of the correctness of the ruling of the circuit court.

As a part of an elaborate series of instructions, the circuit court instructed the jury as follows:

"No. 21. As I have said, every person is presumed to be of sound mind. This presumption remains until the contrary appears, or at least until a reasonable doubt thereof arises from the evidence in the case.

"No. 22. Only persons of sound mind in law can be convicted of crime. The statute of Indiana provides that the phrase 'of unsound mind' shall include idiots, *non-compos*, lunatics and distracted persons. It includes all persons who are not of sound mind from any cause. When considered in relation to crime, it is a general rule that persons who are in that condition which the law recognizes as of unsound mind, are not responsible criminally for their acts when in that condition. But it is also true that mere weakness of mind alone, or slight mental ailments which do not exclude the knowledge

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of right and wrong and the power to act in accordance with the plain dictates of reason and justice, do not constitute unsoundness of mind in law.

“No. 23. In order that the act shall constitute (a crime), the person must have intelligence and capacity enough to have a criminal intent and purpose, and if his reason and his mental powers are so deficient that he has no will, no controlling or mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not responsible for his criminal acts. But these are extremes easily distinguished, and not to be mistaken. The difficulty lies between these extremes. In cases of partial insanity, when the mind may be clouded and weakened, but not remembering, reasoning and judging, or so perverted by insane delusions as to act under false impressions or influences. In these cases the rule is this: A man is not to be excused from responsibility if he has capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he is then doing, (to have) a knowledge and consciousness that the act he is then doing is criminal and wrong, and will subject him to punishment. In order to be responsible, he must have sufficient power of memory to recollect the relations in which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of justice and right, injurious to others and in violation of the dictates of duty. On the contrary, although he may be laboring under partial insanity, if he still understands the nature and character of his act, and its consequences, if he has a knowledge that it is wrong and criminal and a mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong and receive punishment, such partial insanity is not sufficient to exempt him from responsibility for criminal acts. He is then not insane. The true test is this: Has the defendant in a criminal case the power, at the time he commits the act, to distinguish right from wrong and the power

to adhere to the right and avoid the wrong? Has the defendant, in addition to this, the power to govern his mind, his body and his estate? If he has these powers he must exercise them. He is then in law not a person of unsound mind, and the law will hold him answerable for his acts. But if his mind be so unsound that he has them not, then the law will excuse his act by reason of the unsoundness of his mind."

It is claimed that this last instruction is, on the subject of partial insanity, in conflict with the doctrine of the case of *Sage v. State*, 91 Ind. 141, and has no real support from the later case of *Goodwin v. State*, 96 Ind. 550.

In its reference to partial insanity there is an evident confusion of terms and phrases in the instruction. Taken in its literal sense, it is abstractly wrong. It will not do, under our statutory definitions of mental unsoundness, to say that a man may be partially insane and yet not insane. The fair inference from that part of the instruction to which we refer, when taken in connection with the context, is that a person may labor under mental weaknesses and infirmities which amount to a seemingly partial insanity without being actually insane.

We have frequently announced the rule to be that in determining the correctness or incorrectness of an instruction it must be considered as a whole, and not in its separate parts; also, in connection with all the other instructions, if any, given at the same time. *Nicoles v. Calvert*, 96 Ind. 316; *Louisville, etc., R. W. Co. v. Shanklin*, 98 Ind. 573; *Story v. State*, 99 Ind. 413.

While the instruction under discussion bears the marks of having been hastily prepared, and might doubtless be much condensed and improved by being more carefully re-written, we think that, considered as a whole and in connection with the two preceding instructions, also above set out, it contains nothing materially injurious to the appellant, and ought not to be regarded as inconsistent with either the case of *Sage*

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v. *State*, or of *Goodwin v. State*, to which reference has been made.

A more pointed and condensed instruction on the subject of partial insanity, which stated the law correctly, was asked by the appellant and refused by the court, but regarding that branch of the question of insanity as having been sufficiently elaborated by the instructions which had already been given, there was no error in the court's refusal to give a further instruction on the subject.

This cause was tried at the April term, 1884, of the court below, which commenced on Monday, the 28th day of April of that year, and which being by the statute limited to a session of three weeks, closed for all ordinary business on Saturday, the 17th day of the ensuing May.

The record shows that at six o'clock on the evening of said 17th day of May this cause was still on trial and undetermined, and that the court thereupon, at that hour, made the following order and entry of record in its proceedings therein: "The court and jury being engaged in hearing evidence herein, and it being the last day of the present term of this court, and this cause being now on trial and not yet concluded, and the time of this term being insufficient therefor, and the court now orders and directs that this cause shall be continued until Monday, May 19th, 1884, at 10:30 o'clock A. M. of said day last aforesaid, and the court now orders that the jury trying said cause, and all witnesses subpoenaed as such, in this trial, are notified and required to be in attendance on said trial on said day. And to the action of the court in ordering that this cause be continued until Monday, May 19th, 1884, and in directing the jury and witnesses to be present on said day, the defendant now at the time objects, because that there are yet six hours of this term unexpired, and because the court has no power to continue the trial of this cause beyond the present term of this court, and the court overruled said objections."

In the case of *Wright v. State*, 5 Ind. 290, it was held that

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when a criminal cause was on trial, and undisposed of, at the end of a regular term of court, under circumstances similar to those disclosed in the record in this cause, the court might adjourn over until the following week and continue its session until the cause should be finally disposed of.

That conclusion was based upon section 325, R. S. 1843, p. 733, which was adjudged to have been, inferentially and constructively, continued in force by the criminal code of 1852.

The same parity of reasoning requires us to hold that the section of the R. S. 1843, in question, was continued in force by section 1900, R. S. 1881. In fact that section was incorporated into, and treated as in force, by those charged with the publication of the revision of 1881, and is known as section 1379 of that revision of our statutes. The section referred to is as follows: "If at the expiration of the time fixed by law for the continuance of the term of any court the trial of a cause shall be progressing, said court may continue its sitting beyond such time, and require the attendance of the jury and witnesses, and do, transact, and enforce all other matters which shall be necessary for the determination of such cause; and in such case, the term of said court shall not be deemed to be ended, until the cause shall have been fully disposed of by said court."

It is contended, however, that upon the authority of the case of *Morgan v. State*, 12 Ind. 448, the court below ought to have continued in session until midnight of the last day of its regular term before making an order to adjourn over until the following Monday and to continue its session beyond such last day of the term.

We do not stop to inquire how far the case of *Morgan v. State*, *supra*, ought to be, and may be safely followed as to the time and as to the circumstances under which a court may lawfully adjourn over and continue in session beyond its regular term. In this case, as has been seen, it was adjudged and made to appear affirmatively, that the cause could

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not be finally disposed of within the time to which the term was limited. In that condition of affairs, the order made at six o'clock of the evening of the last day of the term for a continuance of the session of the court beyond that day, was not in any event prematurely made, but was clearly within the spirit and meaning of the section of the R. S. 1843, continued in force as above stated, and properly carried the trial of the cause over until and into the next week.

It is further contended that this last named section, instead of being continued in force by the criminal code of 1881, was in fact repealed by sections 1289, 1290 and 1291 of the revision of that year. We, however, see no room for such a construction of these last named sections, and hence can not agree that such a construction ought to be placed upon them.

The transcript of the proceedings below, when first filed in this court, showed that only eleven of the twelve jurors empanelled to try the cause were present when the verdict was returned into the circuit court. Proceedings were, however, very promptly commenced in that court, after this appeal was taken, to have the record amended in that respect, and notice of the pendency of those proceedings was served on the appellant in prison, as well as upon his attorneys of record below. After hearing the evidence, the circuit court entered an order, *nunc pro tunc*, amending the record as originally made, so as to make it show that all the jurors were present when the verdict was returned, and a transcript of these latter proceedings has been certified to this court, and made a supplemental part of the record now before us.

It is objected that these amendatory proceedings have not cured the defect in the original record; that notice to the appellant while in prison was inoperative, and that the case was one in which notice to an attorney of record was not authorized; also, that the order assuming to amend the defective record was made upon improper and insufficient evi-

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dence. In the first place, waiving all question as to the validity of the notice to the attorneys of record, we consider the service of notice upon the appellant, although in prison, as being from the very necessity of the case, sufficient. In the next place, there is nothing in this proceeding which either is or purports to be an appeal from the order making the amendment in question. The assignments of error raise no question upon that order. There is consequently no question before this court, either upon the character or sufficiency of the evidence upon which the order was made. The only inquiry we are required to make concerning these supplementary proceedings is, Did the court below have jurisdiction to make the order *nunc pro tunc* which it assumed to make? That it had complete jurisdiction over the subject is well established by the authorities. The power to amend imperfect records of past proceedings extends to criminal as well as to civil proceedings. See 1 Bishop Crim. Proc., section 1343, *et seq.*; Wharton Crim. Plead. & Prac., section 913; *Smith v. State*, 71 Ind. 250.

The judgment is affirmed, with costs.

Filed June 26, 1885; petition for a rehearing overruled Oct. 10, 1885.

No. 11,041.

LIGGETT ET AL. v. FIRESTONE.

SUPREME COURT.—*Brief.*—A paper giving what is denominated “a history of the case,” and stating that “appellants contend that the sheriff’s sale was not completed till July 7th, 1882,” is not a brief.

SAME.—*Duty of Counsel.*—It is the duty of counsel to do more than make assertions; they should state reasons for their propositions, and, if necessary, cite authorities in their support.

From the Marshall Circuit Court.

J. D. McLaren and H. Corbin, for appellants.

A. C. Capron, for appellee.

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The Michigan Mutual Life Insurance Company v. Kroh *et al.*

ELLIOTT, J.—A paper has been filed giving what is denominated “a history of the case,” and stating that “appellants contend that the sheriff’s sale was not complete till July 7th, 1882.” This statement is all that even approaches an argument, and it certainly is not such a presentation of a point as settled rules require. It is the duty of counsel to do more than make assertions; they should state reasons for their propositions, and, if necessary, cite authorities in their support. In the present instance, we should have been informed why the sale was not complete until July 7th, 1882, and if not complete how that fact affected the appellants. This court has very many times declared what constitutes a brief, and, under the rules laid down by those decisions, the paper before us falls very far short of possessing the requisites of a brief.

Judgment affirmed.

Filed May 9, 1884; petition for a rehearing overruled Oct. 8th, 1885.

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No. 11,998.

THE MICHIGAN MUTUAL LIFE INSURANCE COMPANY v.
KROH ET AL.

TAX SALES.—When Void.—Personal Property.—A sale of real estate for taxes, while the owner has available personal property subject to distress and sale, is illegal and void.

SALE.—Tender within Time for Redemption.—Deed.—Interest.—Under sections 227 and 254, 1 R. S. 1876, pp. 124, 128, where an invalid and void sale for taxes has been made, if the land-owner, within the time for redemption and before a deed has been issued to the purchaser, tendered to the proper officer all legal taxes due, together with the lawful interest and charges thereon, a deed subsequently issued would not entitle the purchaser to recover the twenty-five per cent. interest provided for in section 257 of the same act. *Aliter*, if no tender had been made within the proper time.

SAME.—Quieting Title.—In such case, the land-owner might quiet his title against the holder of such deed by averring and proving the illegality

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of the sale, the tender and bringing of the money into court for the benefit of the purchaser.

SAME.—Section 6466, R. S. 1881, relating to redemption, has reference to sales which are not void.

From the Howard Circuit Court.

A. N. Grant, J. C. Blacklidge, W. E. Blacklidge and B. C. H. Moon, for appellant.

C. E. Hendry and D. A. Woods, for appellees.

MITCHELL, J.—Frances M. Kroh brought this action to quiet her title to lot No. 41, in the city of Kokomo. She alleges in her complaint, that the treasurer of Howard county sold part of the lot on the 9th day of February, 1880, for \$69.37, the amount of taxes due on the lot and on certain personal property owned by her at and prior to that time, and that at the time the lot was sold she was the owner of an amount of personal property, which she describes, more than sufficient to pay the taxes, and which was available for that purpose; that the treasurer, before selling the lot, did not demand, levy on, nor sell any of the personal property, and that the sale was therefore illegal.

It is further averred that on the 9th day of February, 1882, she being a married woman, and before any deed was made to the purchaser at such sale, she tendered to the county treasurer in payment of the tax, interest, penalty and costs, the sum of \$73, which was more than the amount due, and that she has at all times been ready to pay the amount, and that she brings that sum into court for the defendant, who, it is averred, holds a deed under the alleged illegal tax sale.

In a second paragraph she alleges that the treasurer of the city of Kokomo made a like illegal sale, and that she made a like tender to him before a deed was issued, of the amount of taxes, interest, etc., and that the defendant has title under that sale also, and that she was, during all the time, and still is, a married woman.

On the hearing, the court quieted the plaintiff's title, sub-

The Michigan Mutual Life Insurance Company v. Kroh *et al.*

ject to a lien for \$89.88, less \$73 tendered on account of the sale made by the county treasurer, and for \$78.59, less \$66.50 tendered on account of the city taxes. From this decree the insurance company has appealed.

Conceding the invalidity of the tax sale upon the facts stated in the complaint, and admitting Mrs. Kroh's right to redeem, counsel for the insurance company contend that the redemption must have been made under section 208, 1 R. S. 1876, p. 121, which was in force at the time the sale occurred, and having failed so to redeem it is contended the company was entitled to enforce its lien under section 257 of the same statute, giving interest at 25 per cent. 1 R. S. 1876, p. 129.

The sale of the lot, having been made while the owner had available personal property subject to distress and sale, was illegal and void. *McWhinney v. Brinker*, 64 Ind. 360; *Morrison v. Bank of Commerce*, 81 Ind. 335, and cases cited.

Section 227 of the statute above referred to made it the duty of the auditor upon discovering that a tax sale of real estate was void for any reason to decline to make a conveyance for the land, and provided that the purchase-money should be refunded to the purchaser, with interest, on the order of the auditor.

Section 254 provided, in substance, that no sale of real estate for the non-payment of taxes should be invalid, "unless it shall be made to appear that all legal taxes assessed upon such real estate, together with all legal costs and charges thereon, were tendered to the officer authorized to receive such redemption money, within the time limited by law for the redemption thereof."

Under these statutes, where an illegal sale of land had been made, no authority existed in the auditor to make a deed, but unless the persons whose lands were sold within the time allowed by law for redemption, paid, or offered to pay, all legal taxes, with all legal costs and charges thereon, the presumption would be indulged that the sale was legal, and a deed might be made.

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Where, however, as in this case, an illegal sale was made, and the plaintiff, within the time prescribed by section 254, complied with its provisions by tendering the amount of the taxes legally assessed, together with the legal costs and charges, the presumption of legality was destroyed, and no authority existed thereafter to make a deed for her lot, if the sale was in fact illegal.

As the complaint avers that the amount tendered was more than the amount of the taxes assessed against the lot, together with the costs, interest and charges thereon, and as it is averred that the tender was kept good and the money brought into court to be at its disposal, the complaint was sufficient, and the demurrer was correctly overruled.

We think the finding and judgment were more favorable than the appellant had a right to ask, and that there was, therefore, no error in overruling the motion for a new trial.

Judgment affirmed, with costs.

Filed April 30, 1885.

ON PETITION FOR A REHEARING.

MITCHELL, C. J.—In support of the petition for a rehearing in this case, it is earnestly contended that the decision heretofore rendered is in conflict with that made in the later case of *Helms v. Wagner*, *ante*, p. 385.

In the case under consideration the tax sale was void, and within the time allowed for redemption, and before a deed was executed by the auditor to the purchaser, the owner of the land tendered to the proper officer the amount of all taxes, interest and costs due. The officer refusing to receive it, the amount so tendered was brought into court to be subject to its order.

In *Helms v. Wagner*, *supra*, the tender was not made until after the deed was executed, and until the period for redemption had presumptively expired. The rights of the parties under the different circumstances of the cases are determined

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upon different considerations and under provisions of the law entirely different. What we hold in the principal opinion is, that where an invalid and void sale for taxes has been made, if the land-owner, within the time for redemption and before a deed has been issued to the purchaser, tenders to the proper officer all legal taxes due, together with the interest and charges thereon, a deed subsequently issued will not entitle the purchaser to recover twenty-five per cent. penalty as contended for. If, however, the sale is illegal, and no tender has been made within the proper time and until after the issuance of a deed to the purchaser, then the rights of the parties are to be determined as in *Helms v. Wagner*, *supra*.

It is contended, however, that a redemption from a tax sale, although such sale was illegal and void, can only be had under the provisions of section 6466, R. S. 1881, which provides for the payment of a penalty of twenty-five per cent. Any other construction, it is said, would discourage purchases of property at tax sales, and thus embarrass the State in the collection of taxes.

The effect of a statutory redemption is to relieve the land from a sale which has been made. If none has been made, or if that attempted is absolutely void, there is no sale from which to redeem. The obligation of the taxpayer, until the making of a deed, remained precisely the same after as before such sale, except that he may have incurred the cost of making it, and was bound to pay interest to reimburse the purchaser in addition. Manifestly, section 6466 has reference to sales which are not void. This is apparent when it is considered in connection with section 6486. This section is the same as section 227, referred to in the principal opinion. It provides that the auditor shall not convey lands to the purchaser which have been illegally sold for taxes, but upon discovering the fact shall refund the purchase-money, with interest, to the purchaser, and shall charge the amount re-

The Michigan Mutual Life Insurance Company *v.* Kroh *et al.*

funded against the land on the delinquent tax list, to be collected as other taxes.

What effect, if any, the amendment of 1883 has upon this we need not decide. As the law under which the rights of the parties in this case are to be determined stood, the authority of the auditor to issue a deed was gone upon the discovery that the sale was illegal. He was not bound to take notice of the illegality of the sale, but if, before the issuance of a deed, the land-owner tendered the money for all taxes legally due, with interest, penalties for delinquency and charges thereon, and the sale was in fact illegal, this discharged his obligation. If, afterwards, as in this case, the auditor issued a deed to the purchaser, it would enable the owner of the land to quiet his title against the holder of such deed by averring and proving the illegality of the sale, the tender and bringing of the money into court for the benefit of the purchaser.

It is said that this view of the case secures to the delinquent taxpayer immunity from the payment of taxes when due by the payment of six per cent. interest, in addition to the penalty for delinquency.

It only secures him immunity in case his property is sold illegally, and from such sales he is entitled to immunity. His property is liable to distress and sale, and it is no hardship to require that it be sold in compliance with law. In no event could the purchaser lose his money, but he took the chance that if the sale was illegal and void, he might only receive it back, with lawful interest, provided it was paid within the time for redemption and before a deed was issued. Tax laws, so far as they relate to redemption, should be liberally construed in favor of the land-owner.

The petition for a rehearing is overruled.

Filed Oct. 15, 1885.

Windell v. Hudson, Administrator.

No. 12,225.

100	591
194	295
194	542

WINDELL v. HUDSON, ADMINISTRATOR.

CONTRACT.—*Parol Agreement.*—*Statute of Frauds.*—A parol agreement between A. and B., that A. will pay or answer for the debt of B., is not within the statute of frauds.

SAME.—*Consideration.*—*Pleading.*—Where an action is founded upon a parol promise, it is necessary that the consideration of such promise should be stated with such particularity as will enable the court to decide whether or not it is sufficient.

DECEDENTS' ESTATES.—*Statement of Claim.*—*Pleading.*—*Practice.*—The "succinct statement" of a claim against a decedent's estate, as required by statute, must contain all the facts necessary to show *prima facie* that such estate is lawfully indebted to the claimant, or it is bad on demurrer.

From the Harrison Circuit Court.

C. W. Cook, for appellant.

W. H. Hudson, for appellee.

HOWK; J.—The only error assigned by the appellant, upon the record of this cause, is the ruling of the court in sustaining a demurrer, for the alleged want of sufficient facts, to his verified claim or complaint against the appellee, as administrator of the estate of Catharine Shields, deceased.

In his claim or complaint, the appellant, Windell, alleged, in substance, that, on the — day of —, 187—, one Charles E. Miller instituted suit in the court below against the appellee's intestate, Catharine Shields, then in full life, and the appellant, for cutting down and removing certain timber trees from certain real estate, then in the possession of such decedent as tenant for life; that the appellant had purchased such trees of such decedent; that, at the time Miller instituted such suit, none of the trees had been removed by appellant, or by his authority; that as soon as appellant learned of such suit he informed the decedent that he would not remove such timber trees; that the decedent then and there offered and agreed with the appellant that she would pay all costs that might accrue against them by reason of such suit; that, thereafter, such proceedings were had as that the court

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adjudged that the plaintiff in such suit recover of the defendants therein, namely, the appellee, administrator of such decedent, and the appellant, Windell, certain costs in such suit, amounting in the aggregate to the sum of \$353.35; that such judgment remained wholly unpaid; that appellant stood charged, by such judgment, with the payment thereof; that appellant ought to have an allowance against such decedent's estate for the sum of \$176.67, the one-half of such judgment; that whatever sum might be allowed to appellant ought to be applied to the payment of such judgment for costs, and he suggested that the court should so order; and that such sum of \$176.67, after deducting all proper credits and set-offs, was justly due and wholly unpaid.

The question for our decision may be thus stated: Are the facts stated by appellant, in his claim or complaint, sufficient to show *prima facie* a valid and subsisting indebtedness to him from the estate of appellee's intestate? In section 2310, R. S. 1881, in force since September 19th, 1881, it is provided that the holder of any claim against a decedent's estate, whether such claim be due or not, "shall file a succinct and definite statement thereof in the office of the clerk of the court in which the estate is pending." In so far as any question of pleading is concerned, there is no material difference between this statutory provision and the provisions of section 62 of the act of June 17th, 1852, for the settlement of decedents' estates. 2 R. S. 1876, p. 512. It was often held by this court, that the older statute did not require a regular complaint, under the ordinary rules of pleading, but merely a succinct statement of the claim. *Hannum v. Curtis*, 13 Ind. 206; *Ginn v. Collins*, 43 Ind. 271; *Post v. Pedrick*, 52 Ind. 490. But it has also been held, and correctly so, we think, that such succinct statement should contain all such facts as were necessary to show *prima facie* that the decedent's estate was lawfully indebted to the claimant, or it would be held bad on demurrer thereto, for the want of

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sufficient facts. *Huston v. First Nat'l Bank*, 85 Ind. 21; *Moore v. Stephens*, 97 Ind. 271.

We learn from the briefs of counsel on both sides, that the appellant's claim or complaint, in the case at bar, was held bad on the demurrer thereto, because the agreement of the decedent mentioned therein was within the statute of frauds and void. As the appellant did not aver that such agreement was in writing, we must assume that it was an oral or verbal agreement. *Langford v. Freeman*, 60 Ind. 46; *Goodrich v. Johnson*, 66 Ind. 258; *Ice v. Ball*, ante, p. 42. But, although such agreement was verbal or oral, it was not within the statute of frauds. As it is stated in the claim or complaint, the decedent's agreement with the appellant was to pay or answer for, not the debt of another, but the appellant's own debt. Such an agreement is not within the statute of frauds, and, if it is supported by a sufficient consideration, it is a valid and binding agreement. *Louisville, etc., R. W. Co. v. Caldwell*, 98 Ind. 245.

This brings us to the real and fatal defect in appellant's claim or complaint, namely, its absolute failure to show that the decedent's promise or agreement was supported by any sufficient consideration. So far as the claim or complaint shows, the decedent's promise or agreement to pay the appellant's debt is, at most, a mere *nudum pactum*. "Where, as in this case, the action is founded upon a parol or oral promise, it is necessary that the consideration of such promise should be stated with such particularity as will enable the court to decide whether or not the promise sued upon is supported by a sufficient legal consideration." *Wheeler v. Hawkins*, 101 Ind. 486, and cases cited. Nothing was alleged in the claim or complaint, from which it can be inferred even, that the relation of principal and surety existed between the decedent and the appellant in the judgment for costs. Such judgment was apparently rendered in a suit by a reversioner against the tenant for life and her vendee, either to recover damages for waste committed or to enjoin the commission of

Hays et al. v. Reger.

waste. In a suit for either purpose, of course all the tortfeasors were principals, and, between them, the relation of principal and surety could not exist.

We are of opinion, therefore, that appellant's claim or complaint did not state all such facts as were necessary to show *prima facie* that the decedent's estate was lawfully indebted to the claimant in any sum whatever. It follows that no error was committed by the court in sustaining appellee's demurrer to appellant's claim or complaint.

The judgment is affirmed, with costs.

Filed Sept. 23, 1885.

No. 12,038.

HAYS ET AL. v. REGER.

PAROL TRUST IN LAND.—*When May be Averred and Proved.—Judgment.*—

A parol trust in land, which has been executed, may be averred and proved for the purpose of showing that the apparent owner had no interest which was subject to the lien of a judgment against him.

SAME.—*Equity.*—A court of equity will confine the lien of a judgment to the actual interest of the judgment debtor in the property.

SAME.—*Estoppel.*—The fact that goods were sold to the apparent owner on the faith of his title, which is not shown to have been of record, will not, in the absence of fraud, where the actual owner remains in possession and has no knowledge of the credit so extended, work an estoppel.

From the Marion Superior Court.

J. L. McMaster and A. Boice, for appellants.

I. Klingensmith, for appellee.

MITCHELL, C. J.—On the 15th day of August, 1872, William Reger was the owner of a lot in Davidson's heirs addition to the city of Indianapolis. On that day, his wife joining, he conveyed it to John Stumph by an absolute deed.

This conveyance was made without any consideration, and upon a parol trust, that the title should be held for the benefit of Reger, who remained in possession and paid the taxes.

108	524
124	356
102	524
131	227
102	524
137	220
102	524
144	72
102	524
152	262
102	524
156	68

Hays et al. v. Reger.

On the 9th day of February, 1878, by the direction of Reger, Stumph and wife conveyed the lot to the appellee, Reger's wife.

While the title was in Stumph in the manner stated, Hays and Wiles recovered a judgment against him in the Marion Superior Court.

After the lot was conveyed to Mrs. Reger, the city of Indianapolis, by due proceedings, condemned it for street purposes, assessing her damages at \$412.50. This sum was paid into the city treasury. Hays and Wiles claimed the money, or part of it, from the city treasurer, on account of the alleged lien of their judgment which was acquired while the legal title was in Stumph.

This suit was brought by Mrs. Reger against the city and its treasurer and Hays and Wiles, for the purpose of establishing her right to the money.

The determination of a single question, which is raised in the record in various ways, settles all there is in the case.

Appellants claim that because the deed from Reger and wife to Stumph was absolute, and the alleged trust in favor of Reger rested in parol, the lot was bound by the lien of the Hays and Wiles judgment, and that it was, therefore, not competent to aver and prove the parol trust. There is no claim of any fraud in the transaction.

It is averred in an answer, to which a demurrer was sustained, that the judgment of Hays and Wiles was rendered upon a note executed by Stumph to them, and that the consideration of the note was goods and merchandise sold by them to him on the faith that he was the owner of the lot.

The question is not whether the parol trust may be enforced, but, the parties having voluntarily executed it, is it competent to aver and prove that it existed in order to defeat the apparent lien of Hays and Wiles' judgment?

The case can not be distinguished in principle from *Moore v. Cottingham*, 90 Ind. 239, in which it was decided in a well considered opinion by BEST, C., that although the trust rested

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in parol, since it had been executed, proof of the facts will be allowed, as against the claim of a judgment creditor.

It is insisted that *Moore v. Ottingham*, *supra*, effects a virtual abrogation of section 2969, R. S. 1881, which inhibits the creation of trusts concerning lands, unless such trusts arise by implication of law, or are created by writing signed by the party creating the same. We think no such consequences follow from the decision referred to.

This statute, as also the statute of frauds, was enacted, not that parties might avoid trusts which were executed, but rather to enable them, in case of an attempt to enforce such trusts while they remained executory, to insist on certain modes of proof in order to establish them.

The trust having been executed, we need not determine whether it was one arising by implication of law, or whether it was an express trust. Whether it was one or the other, the parties having voluntarily executed it, the authorities are that it may be proved by parol for the purpose of showing that the apparent owner had no interest which was subject to the lien of a judgment against him.

In the case of *Sieman v. Austin*, 33 Barb. 9, a judgment creditor sought to subject the interest of an apparent owner of land to the lien of his judgment after such owner had conveyed it to the real owner in execution of a trust with which he had been invested by parol. The trust seems to have been an express trust, and the direct question was made, whether parol evidence was, under the circumstances, admissible to show the nature of the transaction. It was there said: "The law refuses its aid to enforce agreements creating trusts or charges upon lands, when they rest altogether in parol, not because the trusts are therefore void, but because it will not permit them to be proved by such evidence. But when a person who has received the title to lands purchased for the benefit of another, although without having declared the fact in writing, recognizes and fulfils the trust, it is not the duty of the court to deny its existence. * * * A debtor will not be

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permitted to convey away his property, either real or personal, and relieve it from the encumbrances occasioned by his debts; but there is nothing to prevent his restoring to others their property if it has been placed in his hands. Nor is there any reason why the property of others should be subjected to the payment of his debts, if he is honest enough to refuse to avail himself of an opportunity to use it for that purpose." See, also, *Borst v. Nalle*, 28 Grat. 423.

The interest which the lien of a judgment affects is the actual interest which the debtor has in property, and a court of equity will always permit the real owner to show, there being no intervening fraud, that the apparent ownership of another is or was not real, and when the judgment debtor has no other interest, except the naked legal title, the lien of a judgment does not attach. *White v. Carpenter*, 2 Paige, 217; *Keirstled v. Avery*, 4 Paige, 9; *Thomas v. Kennedy*, 24 Iowa, 397; *Brown v. Pierce*, 7 Wall. 205. A court of equity will confine the lien of a judgment to the actual interest of the judgment debtor in the property. *Monticello, etc., Co. v. Loughry*, 72 Ind. 562.

The appellants are neither parties nor privies to the transaction which they assail, and they will not be heard to object to it on account of the nature of the evidence by which it is proved, since the parties themselves have executed it and are satisfied with it. *Dixon v. Duke*, 85 Ind. 434; *Morrison v. Collier*, 79 Ind. 417; *Savage v. Lee*, 101 Ind. 514.

As Stumph had nothing but the naked legal title to the lot, Reger remaining in possession, and as it does not appear that there was any fraud or concealment, or that Stumph's deed was of record even, or that Reger had any knowledge of the credit extended to him, the fact that goods were sold to him on the faith of his title can not estop the appellee to show her right. We find no error in the record.

Judgment affirmed, with costs.

Filed May 26, 1885; petition for a rehearing overruled Oct. 16, 1885.

Brechtbill v. Randall et al.

No. 12,143.

BRECHBILL v. RANDALL ET AL.

CONSTITUTIONAL LAW.—*Act Regulating Sale of Patent Rights.*—The statute requiring persons who sell, or offer for sale, patent rights to file with the clerk of the proper county a duly authenticated copy of the letters patent, and an affidavit that the letters are genuine and have not been revoked or annulled, and that they have authority to sell the right patented, is valid.

SAME.—*Power of State to Make Police Regulations.*—The State has power to make police regulations for the protection of its citizens against fraud and imposition.

SAME.—*Discrimination.*—*Restriction upon Commercial Intercourse.*—The State is not inhibited from enacting police regulations which operate upon instrumentalities or articles of commerce, provided no discriminations are made against classes of citizens, and no restrictions are placed upon commercial intercourse.

SAME.—In enacting a statute particularly applicable to one thing of a peculiar nature, there is no discrimination, and no obstruction of commerce.

CASE OVERRULED.—*Grover & Baker Sewing Machine Co. v. Butler*, 53 Ind. 454, is overruled.

From the Noble Circuit Court.

P. V. Hoffman and *N. L. Agnew*, for appellant.

W. L. Penfield, for appellees.

ELLIOTT, J.—If the statute requiring persons who sell, or offer for sale, patent rights to file with the clerk of the proper county a duly authenticated copy of the letters patent, and an affidavit that the letters are genuine and have not been revoked or annulled, and that he has authority to sell the right patented, is valid, this judgment must be affirmed; otherwise it must be reversed.

In our opinion the statute is valid, for the reason that in enacting it the Legislature exercised a police power resident in the State. The power to make police regulations for the protection of its citizens against fraud and imposition is not taken from the States by the Federal Constitution or by any National statute. It has, indeed, been authoritatively settled that the National Legislature can not exercise police

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powers for the protection of the inhabitants of a State; this is a domestic matter, to be governed and regulated by State laws. *Western Union Tel. Co. v. Pendleton*, 95 Ind. 12 (48 Am. R. 692); *U. S. v. Dewitt*, 9 Wall. 41; *U. S. v. Reese*, 92 U. S. 214; *Munn v. Illinois*, 94 U. S. 113; *Railroad Co. v. Husen*, 95 U. S. 465; *Civil Rights Cases*, 109 U. S. 3.

The State is not inhibited from enacting police regulations which operate upon instrumentalities or articles of commerce, provided no discriminations are made against classes of citizens, and no restrictions are placed upon commercial intercourse. *Western Union Tel. Co. v. Pendleton*, *supra*; *Sherlock v. Alling*, 93 U. S. 99; *County of Mobile v. Kimball*, 102 U. S. 691; *Munn v. Illinois*, *supra*; *Woodruff v. Parham*, 8 Wall. 123; *Slaughter House Cases*, 16 Wall. 36; *Cooley v. Board, etc.*, 12 How. 299; *Mayor, etc., of New York v. Miln*, 11 Peters, 102; *State v. Addington*, 77 Mo. 110.

In the case of *Patterson v. Kentucky*, 97 U. S. 501, the doctrine stated was applied to the case of a patented article, and the principle declared in that case rules here. The doctrine of the case just cited was fully approved in *Fry v. State*, 63 Ind. 552 (see opinion, 565), and must be deemed the law of this State.

We need not inquire whether a statute discriminating against patented articles would, or would not, be valid, for that is not here the question. We are not, therefore, required to review the cases of *Crittenden v. White*, 23 Minn. 24 (23 Am. R. 676), *Hollida v. Hunt*, 70 Ill. 109 (22 Am. R. 63), *Cranson v. Smith*, 37 Mich. 309 (26 Am. R. 514). Here there is no discrimination, for the statute simply prescribes a method by which our citizens can secure protection against fraud. The requirement that a record shall be made is not an unreasonable one, nor does it impede the free course of commerce; it simply compels an exhibition of the source of title and a description of the thing offered for sale. The intangible character of the thing put into market, and its peculiar

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nature, distinguish it from other articles of commerce, and these make necessary laws of a peculiar character. It is the character of the commodity that makes necessary a law applying particularly to it, and not to articles of commerce in general, and in enacting a statute particularly applicable to a thing of a peculiar nature there is no discrimination, and no obstruction to the free course of commerce. Honest dealers can not be harmed by such a law, and if dishonest ones are, all the greater the merit of the law.

The answer avers that no copy of the letters patent was filed, and that no affidavit was made and filed; and it further alleges that the words "given for a patent" were not written in the note. We are not required to decide what the result would be if the answer averred no more than that the words "given for a patent" were not written in the note, for the other allegations in themselves make the answer good. We need not, therefore, determine whether the decision in *Helm v. First Nat'l Bank*, 43 Ind. 167 (13 Am. R. 395), is or is not to be regarded as correctly expressing the law; but it is proper to say that its force and reasoning are much shaken by the later cases. The decision in *Grover & Baker Sewing Machine Co. v. Butler*, 53 Ind. 454 (21 Am. R. 200), was based entirely on the case of *Ex Parte Robinson*, 2 Bissell, 309, and as that case has been overthrown by the decision of the court of supreme authority, the case built upon it must also go down. We must yield to the judgment of the court of last resort, and that requires us to declare that the case of *Grover & Baker Sewing Machine Co. v. Butler*, *supra*, is virtually overruled by the decisions of the Supreme Court of the United States. This result was really established by the decisions in *Fry v. State*, *supra*, and *Toledo Agricultural Works v. Work*, 70 Ind. 253, although not explicitly announced.

Judgment affirmed.

Filed May 26, 1885; petition for a rehearing overruled Sept. 17, 1885.

 Gillette v. Hill.

No. 11,956.

GILLETTE v. HILL.

102	581
127	592
102	531
137	110

SHERIFF.—*Subrogation.*—*Offset.*—*Judgment.*—*Void Execution.*—Where a sheriff, upon a void execution, collects the amount of a valid judgment and pays it over to A., the judgment plaintiff, and subsequently the judgment defendant obtains a judgment against such sheriff for the recovery of the money so collected, such sheriff is subrogated to the rights of A., and is entitled to offset that judgment against the one against him, or to have execution upon it, at his option. Sec. 1214, R. S. 1881.

From the Elkhart Circuit Court.

J. M. Vanfleet, for appellant.

R. M. Johnson, E. G. Herr and *H. C. Dodge*, for appellee.

NIBLACK, J.—In an action against Daniel Hill and Warren G. Hill, Abraham L. Hazen, Richard Todd, Rufus Todd, Horace C. Skinner and John A. Knapp, on the 14th day of February, 1881, recovered a several judgment against Daniel Hill in the "court of the city of Elkhart," in this State, for the sum of \$534.01. On the 25th day of the same month, that court, on the motion of Daniel Hill, granted a new trial in the cause, but then fixed no day for another trial. On the 18th day of March, 1881, the judge of the court lastly above named, having come to the conclusion that the order granting a new trial was void, because not made within *ten* days after the judgment was rendered, issued an execution upon the judgment, which was directed to and placed in the hands of Christopher J. Gillette, as sheriff of Elkhart county. Conceiving that a new trial had been properly granted, and that the judgment had been thereby vacated, Daniel Hill, uniting with Warren G. Hill, commenced a suit on the 25th day of March, 1881, in the Elkhart Circuit Court, against Gillette and the judgment plaintiff, to restrain the enforcement of the execution, and to have it declared and decreed that the judgment had been lawfully vacated. The execution was afterwards, on the 16th day of July, 1881, quashed by order of the judge

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in vacation, and, on the 27th day of the same month, the judge of the court of the city of Elkhart issued another execution on the judgment which was also placed in the hands of Gillette as sheriff. On the 2d day of August, 1881, Daniel Hill, to prevent a levy upon his property, paid the sum of money demanded by the execution under protest, and, on the 11th day of that month Gillette paid over the amount thus collected by him of Daniel Hill to Hazen and others, the execution plaintiffs. Afterwards, at a trial of the injunction suit, in which there had been some amendment in the pleadings, and upon a special finding of the facts, the circuit court came to the conclusions, as matters of law :

First. The city court had authority to take jurisdiction of said cause and render judgment therein.

Second. The said court obtained jurisdiction over the persons and subject-matter in said cause, and the judgment rendered therein is not void and is binding upon the parties, in this action.

Third. The said court had no power to grant a new trial in said cause after the expiration of ten days from the rendition of judgment therein, and the action of the court in granting a new trial therein was and is a nullity and wholly void.

Fourth. That the execution issued upon said judgment was void.

The court thereupon, in effect, adjudged that the execution upon which Gillette had collected the money from Daniel Hill was void, and decreed that the money so collected should be returned to the said Daniel Hill ; and also rendered judgment against the defendants in that proceeding for costs. The Hills appealed from that judgment to this court, assigning error severally upon the first three conclusions of law. This court argumentatively criticised and disapproved of the second and third conclusions of law, but nevertheless affirmed the judgment without any modification, reservation or limitation. See *Hill v. Hazen*, 93 Ind. 109.

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Gillette v. Hill.

On the 18th day of August, 1881, Daniel Hill commenced an action also in the Elkhart Circuit Court against Gillette, to recover back the money collected by the latter from the former upon the execution decreed to be void in the case of *Hill v. Hazen, supra*, and the court made a special finding of the facts, upon which it came to the conclusion that Hill was entitled to recover back from Gillette the money sued for, upon the ground that the third section of the act of April 7th, 1881 (Acts 1881, p. 102), had transferred all such cases as that out of which the controversy had arisen to the circuit court, and that hence the judge of the court of the city of Elkhart had no authority to issue the execution in question. Judgment was thereupon rendered accordingly upon the findings and conclusions thus stated. That judgment was also affirmed by this court. See, also, *Gillette v. Hill*, 96 Ind. 601..

After the affirmance of that judgment by this court, Gillette commenced this proceeding in the court below to have the judgment rendered by the court of the city of Elkhart, in favor of Hazen and others, set off against the judgment obtained against him by Daniel Hill, as above, upon the theory that, under the circumstances attending the various transactions herein set out, he had become subrogated to all the rights of the plaintiffs in, and hence the equitable owner of, the Hazen judgment. The circuit court, however, upon full consideration of the premises, decided that Gillette was not entitled to have the Hazen judgment thus set off against the judgment against him in favor of Daniel Hill, and adjudged accordingly, and it is from that adjudication that this appeal is prosecuted.

In support of the refusal of the circuit court to thus set off one judgment against the other, it is argued that, as a matter of judicial construction, this court held in the case of *Hill v. Hazen, supra*, as well as in the case of *Gillette v. Hill, supra*, that the Hazen judgment had been annulled and set aside by the order granting a new trial, and that, in conse-

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quence, there is now no such a judgment as that once was in existence, and whether the construction thus contended for ought to be maintained, we regard as the controlling question in this cause.

It is a confession we regret to have to make, but it must nevertheless be admitted, that the complications attending this most important question are quite anomalous as well as unfortunate, and may have tended very materially to protract controversy between the parties to this appeal. But we do not feel at liberty to hold that this court has, in legal effect, *decided* that the Hazen judgment was annulled and set aside by the order for a new trial made on the 25th day of February, 1881, as it is claimed was done in the cases referred to; on the contrary, the legal inference from the actual holding in the case of *Hill v. Hazen, supra*, seems to us to be that the judgment in question continued to be a valid and operative judgment.

We are furthermore of the opinion that upon the facts herein above stated, Gillette became subrogated to the rights of the plaintiffs in the Hazen judgment, and entitled to have it set off against the judgment against him in favor of Daniel Hill, or to have execution upon the Hazen judgment at his option. We are led to that conclusion by the general scope, spirit and meaning of section 1214, R. S. 1881, as well as by the general principles which underlie the doctrine of subrogation. See sections 7 and 90, Sheldon Subr., and cases there cited; also, *Burbank v. Slinkard*, 53 Ind. 493; *Shirts v. Irons*, 54 Ind. 13; *Adams v. Lee*, 82 Ind. 587.

The judgment is reversed with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

Filed June 11, 1885. Petition for a rehearing overruled Oct. 14, 1885.

Western Union Telegraph Company v. Huff et al.

No. 11,211.

WESTERN UNION TELEGRAPH COMPANY v. HUFF ET AL.

102 535
150 308

PLEADING.—*Complaint before Justice of Peace.*—*Res Adjudicata.*—The complaint in an action commenced before a justice of the peace is sufficient if it will inform the defendant of the nature of the cause of action, and if a judgment thereon may be used as a bar to another action for the same cause.

SAME.—*Joint Interest.*—*Parties.*—Where it appears from the complaint that the plaintiffs are jointly interested in the cause of action stated, they are properly joined as co-plaintiffs.

PRACTICE.—*Sufficiency of Evidence.*—*Supreme Court.*—Where there is evidence in the record which tends to sustain the finding of the trial court on every material point, the Supreme Court will not disturb it.

From the Tippecanoe Circuit Court.

J. A. Stein and *G. W. Collins*, for appellant.

T. B. Ward and *G. W. Galvin*, for appellees.

HOWK, J.—In this case, the appellees, Samuel A. Huff and Edward H. Brackett, the plaintiffs below, alleged in their complaint that they placed in the hands of appellant's agent, at its office in the town of Monticello, Indiana, a written dispatch, of which the following is a copy:

"June 20th, 1881.

"*To Hon. John R. Coffroth, Lafayette, Indiana:*

"Will you please send us, by first train, seventieth Ill's, containing Mill-burr and Cabbage-seed cases.

"(Signed)

HUFF & BRACKETT."

Which said dispatch was so placed in the hands of the said agent to be transmitted to the said John R. Coffroth, at the city of Lafayette, by the appellant; for the transmission of which the appellees, at the time the dispatch was so placed in the hands of such agent, paid the appellant the sum of fifty cents, the usual charge according to the appellant's regulations, as and for its compensation for such transmission, which sum was received by appellant in full for such compensation; and so the appellant then and there undertook and promised the appellees to transmit the said dispatch, without partiality

and in good faith, to John R. Coffroth, at Lafayette, Indiana, under penalty of \$100; but the appellees say that the appellant wholly failed to so transmit the said dispatch; that the appellant was, on the 20th day of June, 1881, an electric telegraph company, with a line of wires extending from the town of Monticello, Indiana, to the city of Lafayette, Indiana, and was then engaged in telegraphing for the public. Wherefore the appellees prayed judgment for the penalty of \$100, etc.

The cause was tried by the court, and a finding was made for the appellees, and, over the appellant's motion for a new trial, judgment was rendered accordingly.

In this court, the first error assigned by the appellant is the overruling of its demurrer to the appellees' complaint. The grounds of demurrer were as follows:

1. Want of sufficient facts to constitute a cause of action.
2. Defect of parties plaintiffs, in this, that it does not show just relations between the plaintiffs.
3. Misjoinder of parties plaintiffs.

Of the first of these grounds of demurrer, it will suffice to say that the record shows the action to have been commenced before a justice of the peace. A complaint in such a case will be held sufficient if it will inform the defendant of the nature of the plaintiff's cause of action, and be so explicit that a judgment thereon may be used as a bar to another suit for the same cause of action. *Hewett v. Jenkins*, 60 Ind. 110; *DePriest v. State*, 68 Ind. 569; *Beineke v. Wurgler*, 77 Ind. 468.

In the case in hand, the complaint was sufficient in these respects, and it did not appear, on the face of the complaint, that there was any defect of parties plaintiffs, or that there was any misjoinder of such parties. It sufficiently appeared from the allegations of the complaint, that the appellees were jointly interested in the cause of action stated, and this joint interest authorized their joinder as co-plaintiffs in one and the same suit.

Ringgenberg *et al.* v. Hartman *et al.*

The only other error complained of, by the appellant, is the overruling of its motion for a new trial. The only causes assigned for such new trial were, that the finding of the court was not sustained by sufficient evidence, and was contrary to law. These causes for a new trial present for our decision the single question, whether or not there is sufficient legal evidence, appearing in the record, which tends to sustain the finding of the trial court on every material point. In the record of this cause, there is an abundance of such evidence, and, therefore, we can not say that the court erred in overruling appellant's motion for a new trial. *Swales v. Southard*, 64 Ind. 557; *Hayden v. Cretcher*, 75 Ind. 108; *Cornelius v. Coughlin*, 86 Ind. 461. We find no error in the record.

The judgment is affirmed with costs.

Filed April 24, 1884; petition for a rehearing overruled Oct. 29, 1885.

No. 11,444.

RINGGENBERG ET AL. v. HARTMAN ET AL.

CHANGE OF VENUE.—Rule of Court.—Diligence.—An application for a change of venue, filed after the time limited by a rule of the trial court, is insufficient if it does not show the exercise of diligence to discover the fact, upon which it is based, within the time limited.

SAME.—Convenience of Witnesses.—Discretion of Court.—It is within the discretion of the trial court to grant a change of venue on the ground that it is required by the convenience of witnesses, and the Supreme Court will not interfere with its action where an abuse of such discretion is not shown.

PRACTICE.—Rejection of Supplemental Complaint.—New Trial.—Supreme Court.—The rejection of a supplemental complaint is not a cause for a new trial, but such ruling belongs to the class of cases embracing motions to strike out, to make more specific, etc., and must be presented to the Supreme Court accordingly.

SAME.—Evidence.—Where the record fails to show what it is proposed to prove by a witness, there is no available error in sustaining an objection to a question propounded to him.

SAME.—Objection to Evidence.—Bill of Exceptions.—It is not enough to state

108	537
128	360
133	365
102	537
135	674
102	537
145	49

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in general terms that testimony is incompetent; but the grounds of objection must be specifically stated and embodied in a bill of exceptions.

From the Marshall Circuit Court.

J. D. McLaren, L. M. Lauer, J. D. Chaplin and H. Corbin,
for appellants.

A. C. Capron, J. W. Parks and M. A. O. Packard, for appellees.

ELLIOTT, J.—The application for the change of venue made by the appellants was filed after the time limited by a rule of the trial court, and the question is whether the application shows an excuse for not applying for the change within the time prescribed. It is stated in general terms, in the affidavit on which the application is founded, that the cause for which the change was asked was not known to the appellants until the evening before the affidavit was filed, but it is not shown that any diligence was used to discover the fact. On the authority of *Witz v. Spencer*, 51 Ind. 253, the affidavit must be held insufficient, for the reason that it fails to show the exercise of diligence.

The action was brought by the appellants to recover the possession of personal property, and a supplemental complaint was tendered by them after the issues were closed. There is no specification of error presenting this ruling for review, and consequently no question upon it is before us. The ruling was not made upon the trial, nor upon matters connected with it, but the ruling related to the pleadings, and not to matters connected with the trial. The ruling is, therefore, not one to be presented by a motion for a new trial, but belongs to the class of cases embracing motions to strike out, to compel answers to interrogatories by the parties, to make more specific, and the like.

An affidavit for a change of venue, on the ground that it was required by the convenience of the witnesses, was also filed by the appellants, and a motion for a change duly made. In our opinion, the trial court has a discretionary power to grant

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or refuse changes on the ground upon which appellants' application was based, and where a discretionary power exists the appellate court will interfere only in cases, where it appears to have been abused. In this case there was no abuse of discretion.

The record does not show what the appellants proposed to prove by Martin Reed, and, under the settled practice, we must hold that no available error was committed in sustaining the objection to the question propounded to him on his direct examination by the appellants.

It is not enough to state in general terms that testimony is incompetent; the party objecting must specifically state the grounds of objection, and cause them to be embodied in a bill of exceptions. This principle disposes of the question made upon the ruling permitting the appellees to give in evidence declarations of one of the parties made at the time the property was taken by the sheriff under the writ of replevin.

We can not disturb the verdict on the evidence.

We have considered all the questions discussed by counsel, and those not discussed we have treated as waived.

Judgment affirmed.

Filed Mar. 12, 1885; petition for a rehearing overruled Nov. 3, 1885.

No. 12,084.

EPPS v. THE STATE.

CRIMINAL LAW.—Indictment.—Return of.—Where it appears from the record that an indictment was, on a certain day, returned into open court by the grand jury, endorsed "a true bill" by their foreman, the return is sufficiently shown.

SAME.—Motion to Quash.—Where the record discloses enough to authorize the inference that the indictment was duly returned by a lawfully organized grand jury for the term at which it was presented, it is sufficient, in that respect, on a motion to quash.

SAME.—Murder by Arsenic.—Quantity of Poison.—In an indictment charg-

102	539
128	466
102	539
132	826
102	539
135	260
136	222
102	539
141	123
102	539
144	303
145	21
145	566
145	673
147	44
147	379
102	539
148	704
149	406
149	702
150	85
152	320
102	539
154	429
154	649
102	
157	

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102	539
186	185
186	679

102	539
167	233

ing murder by the administration of arsenic, the precise amount of the arsenic is immaterial, if the facts charged show that it was the poison which caused the death.

SAME.—*Absence of Prisoner During Argument of Motion to Quash.*—It is not error to hear argument, on a motion to quash an indictment, in the absence of the prisoner. Section 1786, R. S. 1881, relates merely to the trial.

SAME.—*Arraignment.—Practice.*—A motion to quash, as well as a demurrer to an indictment, in regular order, precedes the arraignment.

SAME.—*Withdrawing Plea of Not Guilty.—Discretion of Court.*—In the absence of a showing of cause, the granting or withholding leave to withdraw a plea of not guilty rests in the discretion of the trial court.

SAME.—*Juror.—Examination of as to Qualifications.*—Much rests in the discretion of the trial court as to what questions may or may not be answered by a person called as a juror, touching his qualifications to serve, but great latitude ought to be allowed. See opinion.

SAME.—*Murder.—Proof that Deceased was Human Being.*—In a prosecution for murder it is unnecessary, but harmless to the accused, to prove that the deceased was a human being.

SAME.—*Accused's Statement as Witness at Coroner's Inquest.—Signature to.—Evidence.*—Where one, who is subsequently indicted for the murder of the deceased, voluntarily testifies as a witness at the coroner's inquest concerning the death of such deceased, it is his duty to attest his statement by his signature, and such statement, if it becomes relevant and material, may be read in evidence against him at his trial.

SAME.—*Evidence.*—The mere facts that such witness, after his statement was reduced to writing, asked an attorney for the prosecution, who was present at the inquest, if signing such statement would clear or criminate him, to which such attorney answered that he did not know, and he then signed without further hesitation, do not make such statement inadmissible as evidence, nor is it a material inquiry whether the attorney's answer was true or untrue.

SAME.—*Harmless Error.*—It is not available error to overrule questions propounded to a witness, which are merely collateral to the main question under investigation, and which can be either permitted or denied without material injury to any one.

SAME.—*Physician.—Opinion.—Credibility.*—A physician who attended the deceased in his last sickness, and who, as a witness at the trial, gives it as his opinion that the case was one of arsenical poisoning, may properly be asked if he had treated it as such, as a means of testing his credibility, but the refusal to permit the question is not necessarily a material error.

SAME.—*Medicine Administered by Physician.—Showing that it Contained no Poison.*—Where the physician administered bismuth to the deceased in

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his illness, and the question is made whether it might not have contained arsenic, he may testify that he afterward gave the same kind of bismuth to another patient without injury, and it may also be shown that a chemist, who analyzed bismuth from the same package, found no traces of arsenic in it.

SAME.—Medical Books.—Medical books are not admissible as evidence.

SAME.—Expert.—Hypothetical Case.—Opinion Certain or Probable.—Where a physician, testifying as an expert, expresses the opinion upon a hypothetical case, that the deceased came to his death by arsenical poison, he may properly be asked, in behalf of the accused, whether his conclusion is one of certainty or only of high probability, but the refusal of the court to permit the question may not be available error in the light of other expert testimony.

SAME.—Misconduct of Counsel in Argument.—For misconduct of counsel for the State in argument, held not sufficient to justify the reversal of the judgment, when considered in connection with interruptive denials of counsel for the accused and the prompt disapproval of the court, see opinion.

SAME.—Instruction.—Death Within a Year and a Day.—Where the evidence shows that the deceased died within a week after his symptoms of arsenical poisoning, it is unnecessary for the court, in stating the facts necessary to a conviction, to tell the jury that death must have resulted within a year and a day after the poison was administered.

SAME.—An instruction which is good as a whole can not be attacked in part.

SAME.—Instruction as to Hypothetical Case.—Expert.—An instruction, that the facts stated in a hypothetical case need not necessarily be always fully proven, to give value to the testimony of an expert, is substantially correct.

SAME.—Circumstantial Evidence.—An instruction, given in connection with proper illustrations and precautions, that the accused's guilt might be established by circumstantial evidence alone, is good.

SAME.—Rejection of Evidence by Jury.—An instruction, that testimony can only be rejected because it is not true, and that when the evidence is irreconcilably conflicting, that which is false must be rejected, is abstractly correct.

SAME.—Instruction Must be Applicable to Evidence.—Where an instruction is asked which is not applicable to the evidence, it will be properly refused.

SAME.—Cumulative Instructions.—It is not error to refuse instructions which are merely cumulative.

SAME.—Misconduct of Jury.—Practice.—Where the trial court hears evidence upon a question of misconduct of the jury, its decision on that question will not be disturbed by the Supreme Court on what may seem to be the weight of the evidence.

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SAME.—Technical Errors.—Where the verdict is right upon the evidence, it will not be reversed for merely abstract and practically harmless errors.

From the Huntington Circuit Court.

A. Moore, L. P. Boyle and Z. Dungan, for appellant.

F. T. Hord, Attorney General, *C. W. Watkins* and *J. C. Branyan*, for the State.

NIBLACK, J.—The appellant, Charlotte Epps, was indicted, tried and convicted for the murder of her husband, John Epps, and sentenced to imprisonment for life.

Though somewhat informally expressed, the record before us shows that the indictment in this case, known then as number 299, was, on the 4th judicial day of the October term, 1883, of the Huntington Circuit Court, returned into open court by the grand jury of Huntington county, endorsed "a true bill" by their foreman, and that was enough to show a proper return of the indictment. *Heath v. State*, 101 Ind. 512.

The indictment was in three counts, each charging murder in the first degree by means of arsenical poison. The first count, after making the usual and formal preliminary recitals, charged the appellant with having, on the 6th day of June, 1883, killed and murdered the deceased by unlawfully, feloniously, wilfully and maliciously administering "to him, the said John Epps, a certain deadly poison, to wit, a poison commonly called arsenic, which he, the said John Epps, then and there received at the hands of her, the said Charlotte Epps, and which he, the said John Epps, then and there swallowed, and by reason of which he, the said John Epps, then and there and thereby died," etc. The other counts charged substantially the same offence, but not precisely in the same language. In neither was it averred what amount of arsenic was administered to the deceased.

The appellant moved to quash the indictment, first, because the record did not set out the names of the grand jurors who returned the indictment, or show the term for

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which such grand jury was empanelled, and did not make it appear affirmatively that the person who endorsed the indictment as "a true bill" was in fact the grand jury's "foreman" as he purported to be, and, secondly, because the amount of arsenic alleged to have been administered was not averred, upon the ground that it was necessary to show that the amount used was sufficient to produce death. The motion to quash was nevertheless overruled, and in that respect no error is apparent. The record discloses enough to authorize the inference that the indictment was duly returned by a lawfully organized grand jury for the term at which it was presented. Moore Crim. Law, section 472; *Powers v. State*, 87 Ind. 144; *Heath v. State*, 101 Ind. 512.

The further inference from the facts charged in each count of the indictment necessarily was, that it was the arsenic administered to the deceased which caused his death, and, in that view, the precise amount so administered was quite immaterial. *Snyder v. State*, 59 Ind. 105.

The circuit court heard a part of the argument upon the motion to quash the indictment in the absence of the appellant, but she was present when the argument was concluded and when the motion to quash was overruled. It is claimed that thus hearing part of the argument, when the appellant was not present, was erroneous, and an elaborate argument has been submitted in support of that claim. Section 1786, R. S. 1881, provides that "No person prosecuted for any offence punishable by death, or by confinement in the State prison or county jail, shall be tried unless personally present during the trial." But this section does not have any relation to motions in a cause, not connected with the trial, and can not in any event be held to require the presence of a prisoner during the argument of a motion merely preliminary to or preceding the trial.

After a demurrer to the indictment had also been overruled, the appellant was arraigned and entered a plea of not guilty to the charge preferred against her.

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Afterwards the appellant asked leave to withdraw her plea of not guilty for the purpose of enabling her to again move to quash the indictment upon the alleged ground that the previous motion to quash had been made before arraignment, and hence prematurely made, but the circuit court overruled her application, and that is also claimed to have been erroneous.

By section 1762, R. S. 1881, it is enacted that "If the motion to quash be overruled, the defendant shall be arraigned by the reading of the indictment or information to him by the clerk, unless he waive the reading; and he shall then be required to plead immediately thereto," unless further time be given to answer. This section makes it plain that a motion to quash, as well as a demurrer to an indictment, in regular order, precedes the arraignment. No cause was, therefore, shown for the withdrawal of the appellant's plea to the indictment, and, in the absence of the showing of any such cause, the granting or withholding leave to her to withdraw her plea rested entirely within the discretion of the circuit court.

One William Fall was called to serve as a juror in the cause, and upon being sworn to answer as to his qualifications to serve in that capacity, answered as follows: "I am a voter and householder of Huntington county, Indiana. I have no particular opinion of the guilt or innocence of the defendant. I have an opinion of it formed from what I have learned of the case from rumor or hearsay, and from reading about it, but don't know whether what I read was the evidence of the case or not." Counsel for the appellant thereupon asked Fall, "When you have an opinion on any subject does it take much evidence to remove it?" The circuit court sustained an objection to that question, and refused to permit it to be answered, to which an exception was reserved. Without any further evidence as to his competency, or objection from, or further exception by, the appellant, Fall was admitted and sworn, and served as a juror in the cause.

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One John Martz was also called to serve as a juror, and upon being sworn said: "I am a voter and householder of Huntington county, Indiana, and (have) not formed or expressed any opinion of the guilt or innocence of the defendant." Counsel for the defendant then propounded to Martz the following questions: "You would not guess the defendant into the penitentiary, or to hanging her, would you?" "What, if anything, have you read of the case?" "You would not convict the defendant of the charge against her to please or displease anybody, would you?" Objections were made and severally sustained to these questions, whereupon the appellant peremptorily challenged Martz, and he was, consequently, not permitted to serve on the jury.

It may be said generally, that the extent to which a party should be allowed to go in the examination of a person called as a juror is not, in this State, and can not well be, governed by any fixed rules. Much rests in the discretion of the court as to what questions may or may not be answered, but in practice very great latitude is, and generally ought to be, indulged.

The question asked of Fall had no direct application to the question then before the court, which was as to the extent and the circumstances under which he had formed an opinion; hence it was not error to sustain an objection to the question. The court ought, perhaps, to have required more evidence to sustain the juror's impartiality, but as the juror was admitted and sworn, without objection from the appellant, no question was reserved upon the omission of the circuit court in that respect.

The second question addressed to Martz might, with propriety, have been permitted, but as he had already answered that he had neither formed nor expressed an opinion as to the guilt or innocence of the appellant, and as no other question had been made upon his competency as a juror, there was seemingly nothing else remaining to which his proposed further

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examination had any material reference. It is, at all events, not apparent that the circuit court was guilty of any abuse of its discretion in sustaining objections to all of the questions propounded to Martz.

James C. Branyan, an attorney of the Huntington Circuit Court, assisted in the prosecution of this cause, and was also examined as a witness on behalf of the State. He testified to having been present at the inquest held upon the body of John Epps, and to the fact that the appellant was examined as a witness at the inquest; also, that the testimony given by her upon the occasion was reduced to writing by a person designated for that purpose. He furthermore stated that when the testimony of the appellant, as it was written out, was read over to her, he told her she was at liberty to sign the paper thus read to her, or not, as she chose, that there was no power which could compel her to sign it if she did not wish to do so; that the appellant then asked him, if signing it would "clear" her of the charge that she had probably had something to do with the death of her then deceased husband, or whether it might not criminate her; that he told her that as to that he did not know; that she thereupon, without apparent further hesitation, signed the paper in question. Counsel for the appellant then inquired of Mr. Branyan whether, at the time he told the appellant that he did not know whether her signing the statement she had made before the coroner would or would not "clear" her, or might or might not criminate her, he did not tell her what was untrue, and what he knew at the time to be untrue. The court sustained an objection to that question, and did not require the witness to answer it, and it is argued that thereby a palpable error was committed.

At the time the appellant made her statement before the coroner, there was no formal accusation against her, and she testified only as a witness in common with other witnesses, concerning the death of John Epps. In such a case, the law required that her testimony should be reduced to writing, and

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subscribed by her, and returned to the clerk of the circuit court with other papers pertaining to the inquest. R. S. 1881, section 5880; *Woods v. State*, 63 Ind. 353. After she consented to testify, it became her duty to attest what she had stated by her signature, and as what Mr. Branyan said to her after her testimony was reduced to writing seemingly tended neither to encourage nor to discourage her from subscribing to her statement, his motive in saying what he did added nothing either to the validity or invalidity of her signature, and hence the proposed inquiry as to the truth of what he told her at the time was wholly immaterial. If she had declined to sign her statement, after it had been made and written out, it might have been still used against her in the event that it became relevant and material. 1 Greenl. Ev., section 228.

The appellant's statement made before the coroner was read in evidence, over her objection, and that is made a cause of complaint, in argument here, upon the ground that she was misled by Mr. Branyan, as herein above stated, and that the circuit court erroneously refused to permit him, Branyan, to answer as to the truth of his representations made to her. What we have already said practically disposes of this cause of complaint. But it may be said in addition that there was no pretence that any inducement or threats had been used to obtain a statement from the appellant at the inquest, and that all that is objected to on the part of Mr. Branyan occurred in relation to the signature merely after her statement had been made and committed to writing. Conceding, therefore, that Mr. Branyan was guilty of all that the last question put to him implied, there was still no reason for not admitting the appellant's statement in evidence.

One Baker Pickens was a witness for the State, and testified to having been frequently at and about the house of John Epps during his last sickness, but denied having taken very much interest in the case. Counsel for the appellant then asked him "How did you come to be present when the

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will was probated to find out what was in it?" One Thomas Barker testified to having been at the funeral of John Epps as well as the inquest; also to the fact that two *post mortem* examinations were made of the body. Counsel for appellant then inquired whether it was not the general talk at the time in the neighborhood, that John Epps's body contained arsenic? These questions were both overruled, and we see no error in these rulings of the circuit court. Both questions were collateral merely to the main question under investigation, and were of that class which might have been either permitted or denied without material injury to any one.

Dr. James F. Mock attended upon the deceased during his last sickness, and as a witness described the symptoms which were developed from time to time. He also gave the names of the different medicines which he administered to the deceased in his treatment of the case. While entertaining some doubt at first, he expressed the opinion that the case proved to be one of arsenical poisoning. Counsel for the appellant then inquired whether he had treated the case as one of arsenical poisoning, but the court refused to allow the question to be answered. We think the question was one which ought in strictness to have been permitted, as a means of testing the credibility of the witness, but the information sought by it had only an incidental relation to what was then the subject of inquiry, that is to say, whether the case was really one of poisoning by arsenic, and hence we regard the error committed by the exclusion of the question as not essentially material.

One Dr. Lomax was examined as an expert, and, upon a hypothetical case put to him, expressed the opinion that the deceased came to his death by arsenical poison. Counsel for the appellant thereupon inquired whether the conclusion thus reached by the witness was one of certainty or only of high probability, but the court declined to allow such an inquiry to be made. We esteem that as having been, under all the circumstances, both a pertinent and a proper question, but the

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subject-matter involved was so thoroughly and elaborately discussed and reviewed by other witnesses who testified as experts in the cause, that we feel justified in assuming that no serious injury was inflicted upon the appellant by the exclusion of that question.

It was made to appear by the evidence that Dr. Mock administered bismuth to the deceased during his illness, and the question was made whether bismuth does not frequently contain traces of arsenic, and whether the bismuth so administered might not have been impregnated with arsenic. Dr. Mock was, as bearing upon that question, allowed to testify that he afterwards administered the same kind of bismuth to another patient without any injurious effect, and that he afterwards purchased some more bismuth from the same package and sent it to Dr. Dreyer, a chemist at Fort Wayne, to be analyzed. Dr. Dreyer was then permitted to state that he analyzed the bismuth sent to him by Dr. Mock and found no traces of arsenic in it. All that occurred about the bismuth, after the death of John Epps, was over the objection of the appellant, but the evidence in that respect tended to show that the bismuth administered to Epps was free from arsenic, and was hence material and proper.

The State was permitted to prove that John Epps was a human being. That was unnecessary, but evidently did the appellant no harm. *Merrick v. State*, 63 Ind. 327.

The appellant offered to read in evidence two pages from a book known as "Taylor on Poison," which refers to the impure condition in which bismuth is often found. It was admitted that the book was a standard work on the subject to which it relates, but it was nevertheless held to be inadmissible in evidence. Counsel for the appellant admit that the book was inadmissible according to previous decisions of this court, but maintain that these previous decisions are against reason and an enlightened view of public justice. It is true, that the line of cases on the subject of the non-admissibility of medical works and other books of science, of

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which our cases form a part, has been criticised, and, at times, commented upon unfavorably, but the rule established by these cases has never, to our knowledge, been seriously encroached upon, and nevertheless continues to be generally maintained. No sufficient reason has been suggested, as we believe, for a departure from that rule in the present case. See 1 Greenl. Ev., section 497, and note; *Carter v. State*, 2 Ind. 617; *Longnecker v. State*, 22 Ind. 247. As having some relation to the same subject, see the cases of *Cory v. Silcox*, 6 Ind. 39; *Baldwin v. Bricker*, 86 Ind. 221; *Jones v. Angell*, 95 Ind. 376.

One of the attorneys for the State, in his closing argument, while commenting upon the propriety of convicting upon circumstantial evidence alone, exclaimed: "Why a man was hung at Fort Wayne, in an adjoining county, on circumstantial evidence not one hundredth part as strong as the evidence in this case against Mrs. Epps." These remarks were objected to by one of the counsel for the appellant, who interruptingly said that while he was not familiar with the facts of the case referred to, "he knew that in that case the fruits of the crime had been traced to a pawn-shop." The court thereupon admonished the attorney for the State that he must confine himself to the evidence in his statements to the jury, to which the attorney with much earnestness replied: "I know what I am saying, and I do not want to be interrupted in my argument; it throws me off my line of argument."

On the day before John Epps was taken sick, one Clinton Orndorff, the son-in-law of the appellant, accompanied her, as also did his wife, to the city of Huntington, three miles from their homes.

Orndorff testified that while in the city the appellant gave him five cents to buy some arsenic, avowedly to kill rats and mice; that he bought five cents' worth of arsenic, as requested, and gave it to her in Weaver's store, telling her at the same time, "Here is the arsenic; it is poison; be careful;" that

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the appellant took the package and said "All right; I have handled that before."

The attorney for the State, above referred to, in commenting upon this evidence, said, in substance, "This woman" (pointing to the appellant) "took poison from Clinton Orndorff in Weaver's store and said, 'I know what it is; I know it's poison; I've handled it before; I've buried two husbands and children.'"

Counsel for the appellant again objected, and the court again admonished the attorney for the State that he must keep within the evidence, whereupon that attorney responded: "I don't mean that she" (the appellant) "said it all in Weaver's store; I mean to say that she said in Weaver's store that she knew it was poison, and had handled it before, and that it was a fact that she had buried two husbands and children, but I disclaim any intention to say that she testified to" (these facts) "all in the same connection in the store."

There was evidence tending to prove that the appellant was a widow when she married John Epps, and that she was at the time the mother of two sets of children, from which the inference that she had been twice previously married was not unreasonable, and might, therefore, be assumed.

One Edward Mise was a witness at the trial, and testified primarily on behalf of the State. He was a half-brother of John Epps, and, being unmarried, had lived with him for many years and up to the time of his death. The attorney for the State, continuing his argument, said: "Oh! gentlemen of the jury, if I could tell you what that good old man, Edward Mise" (pointing to him), "told me he knows about other dark things surrounding this case, it would clear away much of the mystery about it, about which counsel for defence talk so much." Counsel for the appellant again objected, and the court directed the attorney for the State to suspend his argument, but he declined to heed the admonition of the court, and proceeded with his address to the jury.

It was a conceded matter at the trial that Mr. Moore, one of

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the appellant's counsel, had formerly resided in Huntington county, but was then a resident of the city of Chicago, and, in the examination of some of the witnesses, a question was made whether the appellant had not employed Mr. Moore in her defence before she was either arrested or formally charged with the murder of her husband.

In commenting upon the appellant's alleged consciousness of guilt, the attorney for the State, further continuing, charged that, "she" (pointing to the accused) "sent to Chicago for Mr. Moore, a criminal lawyer, before she was charged with the crime, and employed him to defend her," intimating that her conduct in that regard afforded another illustration of the truth of the scriptural adage that "The wicked flee when no man pursueth." To this counsel for the appellant also objected, but the attorney for the State again refused to suspend, and continued his argument to the jury.

The attorney for the State evidently went beyond the limits of legitimate debate in some of his statements to the jury, and palpably so in his allusion to what Edward Mise had told him. He also made himself amenable to the circuit court for a contempt of its authority. But, when taken in connection with the interruptive denials and interjections of counsel for the appellant, and the prompt disapproval in each instance by the court, we would not feel justified in holding that the misconduct of the attorney for the State was so gross as to require the reversal of the judgment against the appellant. *St. Louis, etc., R. W. Co. v. Myrtle*, 51 Ind. 566; *Kinnaman v. Kinnaman*, 71 Ind. 417; *Combs v. State*, 75 Ind. 215; *Rudolph v. Landwerlen*, 92 Ind. 34. Such misconduct in argument, as that complained of as above, stands upon a different footing from comments upon the failure of a defendant to testify in his own behalf, since such comments are in violation of the express provision of a statute. R. S. 1881, section 1798.

In one of its instructions, the circuit court told the jury that "It is essential to the conviction of the defendant that

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the following facts must be proven beyond a reasonable doubt, to wit: 1st. The death of John Epps, named in the indictment. 2d. That his death was caused by, or was mediately or immediately accelerated by poison by arsenic. 3d. That the poison thus causing or accelerating the death of John Epps was feloniously administered by the defendant to him, or that the defendant feloniously participated in such administration thereof, or feloniously caused the same to be administered to him. 4th. That the offence was committed in Huntington county, in the State of Indiana."

It is objected that this instruction did not, also, tell the jury that death must have resulted within a year and a day after the poison was administered. In the first place, we see nothing in the instruction, so far as it purported to go, which could have injured the appellant. In the next place, there was no evidence which required the additional definition insisted upon. The last sickness of John Epps, immediately following his symptoms of arsenical poisoning, was of less than a week's duration.

The court further instructed the jury that "The opinions of the experts are to be considered by you in connection with all the other evidence in the case. You are not to act upon them to the *entire* exclusion of other testimony. You are to apply the same general rules to the testimony of experts that are applicable to the testimony of other witnesses in determining its weight, taking into consideration the opinions of the experts, and giving them just weight, you are to determine for yourselves, from the whole evidence, whether the defendant is guilty as she stands charged, beyond a reasonable doubt."

It is complained that this instruction told the jury, in effect, that they might consider the testimony of the experts to the *partial* exclusion of other evidence, and that it was error to so instruct the jury. It does not necessarily follow that the instruction was erroneous, conceding the construction of it contended for. But, however that may be, we see no objec-

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tion to the instruction as a whole, and can only regard the criticism made upon it as an impracticable one. *Goodwin v. State*, 96 Ind. 550.

The next instruction told the jury, in brief, that the facts stated in a hypothetical case need not necessarily be always fully proven, to give value to the testimony of an expert, and that instruction is substantially supported by the case of *Eggers v. Eggers*, 57 Ind. 461.

A subsequent instruction told the jury, in connection with such illustrations and precautions as are usual in such cases, in substance, that the appellant's guilt might be established by circumstantial evidence alone. That doctrine is too well sustained by the authorities to require any extended comment upon it. See 1 Greenl. Ev., section 13 and 13a ; Moore Crim. Law, sections 344, 397.

Two other instructions taken together announced the doctrine that testimony could only be rejected because it was not true, and that when the evidence is irreconcilably conflicting, that which is false must be rejected. This doctrine is oftentimes very difficult of application, but it is doubtless the law when abstractly considered, and we are unable to see that there was anything in either one of these last-named instructions presumably injurious to the appellant.

The appellant asked the court to instruct the jury that "If the proof shows positively that one of two or more persons committed the homicide set out in the indictment, but leaves it uncertain which of them in fact committed the act which caused the death, all such persons must be acquitted, unless it was committed by one of them under circumstances which in law makes the other equally guilty." That instruction was refused, and that refusal is relied upon as clearly and positively erroneous. As applicable to an appropriate state of facts, the instruction states the law correctly, but there was nothing in the evidence in this case to which it could have had any practical application. There was nothing in the evidence which tended even remotely to implicate any one else

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besides the appellant. *Hubbard v. State*, 72 Ala. 164. Either she was guilty, or the whole case remained a profound and impenetrable mystery.

The deceased had symptoms of arsenical poisoning two days before a physician was called, and before any medicine, whether pure or impure, was administered to him. The medicines thereafter prescribed for the deceased were fully explained and accounted for. The instruction was, therefore, correctly refused.

Other instructions were asked by the appellant and refused by the court, but the substance of them had, as we believe, already been given by the court upon its own motion, in some other form, and there was hence no error in refusing merely cumulative instructions. At all events, the jury appear to us to have been fully and carefully instructed upon all the material matters to which their attention was especially required, thus rendering further instructions unnecessary.

Misconduct on the part of the jury was also charged as a cause for a new trial. In support of this charge, affidavits were filed stating that two or three of the jurors were, during the progress of the trial, permitted by their bailiff to walk from the rear of the court-house across the court-house lot, where other people were standing and walking to and fro, a distance of one hundred and fifty or two hundred feet, to a public closet, and return without being accompanied by him; also asserting that one evening, after court had adjourned, the jury were found walking around in the court-house in a more or less dispersed condition amongst a crowd of people who had been attending court, under the pretext of taking some exercise. Counter-affidavits were also filed, either expressly or inferentially, denying the alleged misconduct charged. Upon the issue thus presented the circuit court decided that the charges of misconduct on the part of some of the jurors, as well as the entire jury, were not sustained.

It has been held by this court, that where a motion for a new trial is based upon alleged misconduct of the jury, or

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of certain jurors, and the court has heard evidence, whether presented orally or by affidavit, concerning such alleged misconduct, the conclusion reached will not be disturbed by this court upon what may seem to be the weight of the evidence, and that may now be regarded as a well established rule of practice in this State. *Long v. State*, 95 Ind. 481.

It is claimed, finally, that the verdict was not sustained by sufficient evidence, and that for that reason, if for no other, the judgment ought to be reversed.

It is true, that everything which served to connect the appellant with the death of John Epps rested upon circumstantial evidence, and that the circumstances were not absolutely conclusive against the appellant, yet upon the whole evidence we see no palpable reason for doubting her guilt. The evidence tended to establish beyond all question that the deceased died from arsenical poisoning, produced by the administration of small or divided doses of arsenic; that the deceased was taken sick, with symptoms indicating the presence of arsenic in his stomach, the day after the appellant purchased arsenic as herein above stated; that the appellant cooked the deceased's breakfast and served it to him the morning he was taken sick; that she administered food and medicine to him during his sickness, having opportunities in that respect which no one else enjoyed; that she at first denied having purchased any arsenic the day before her husband was taken sick, and when confronted with the fact that she had done so, she was unable to give any account of what became of the arsenic. There were other circumstances unfavorable to the appellant which it is impracticable to set out at length. The judgment can not, therefore, be reversed upon the evidence.

As affecting criminal causes, section 1891, R. S. 1881, enacts that, "In the consideration of the questions which are presented upon an appeal, the Supreme Court shall not regard technical errors or defects or exceptions to any decision or action of the court below, which did not, in the opinion

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of the Supreme Court, prejudice the substantial rights of the defendant." We construe technical errors to include in this connection merely abstract and practically harmless errors. While, therefore, we agree that some errors and irregularities intervened during the progress of the cause as herein above indicated, we regard these errors and irregularities as not having probably had any perceptible effect upon the result of the trial, and as the verdict was seemingly and in every reasonable view probably right upon the evidence, no sufficient reason has been shown for a reversal of the judgment. *Smith v. State*, 28 Ind. 321; *Rollins v. State*, 62 Ind. 46; *Binns v. State*, 66 Ind. 428.

The judgment is affirmed, with costs.

Filed June 10, 1885; petition for a rehearing overruled Nov. 7, 1885.

 No. 10,530.

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PRACTICE.—*Special Finding.*—*Record.*—A special finding of facts, with conclusions of law, made at the request of a party and signed by the judge, is a part of the record without an order of court.

SWAMP LANDS.—*Treasurer's Certificate Evidence of Legal Title.*—Under section 11 of the act of the State Legislature to regulate the sale of swamp lands, etc., approved May 29th, 1852, 1 G. & H. 599, the county treasurer's certificate of entry is evidence of legal title to the land mentioned therein in the person in whose name it is issued.

SAME.—*Act of Sept. 28th, 1850, is Grant In Præsent.*—By the act of Congress of Sept. 28th, 1850, R. S. of U. S., section 2479 (see 1 G. & H., p. 737), the whole of the swamp and overflowed lands within this State, made unfit thereby for cultivation, which remained unsold at the passage of that act, were granted to this State, and such act was a grant *in præsent*.

SAME.—*Patent.*—*Selection of Lands.*—*Evidence.*—The fact that a patent was subsequently issued to this State by the United States is conclusive evidence that the lands embraced therein were selected for the State, as swamp lands, and that the selection was approved by the proper authority, and establishes title to such lands in this State, commencing on Sept. 28th, 1850.

SAME.—*Relinquishment by State.*—*Title of State's Grantee.*—The State has

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never relinquished to the United States its title to the lands so patented, and evidence of a title, to any of such lands, derived from the United States, subsequent to Sept. 28th, 1850, is of no avail against a title acquired from the State under the swamp land act.

SAME.—*Invalid Release by Governor.*—The attempted release or conveyance, by the Governor of this State, to the United States, in 1859, of certain of such lands, was without authority and invalid.

SAME.—*When State's Grantee May not Question Title from United States.*—The State's grantee is only estopped from questioning a title derived from the United States to particular lands of those granted by the swamp land act of 1850 for which the State received compensation instead of the lands.

From the Benton Circuit Court.

D. E. Straight, U. Z. Wiley and S. F. Carter, for appellant.

H. W. Chase, F. S. Chase and F. W. Chase, for appellees.

PER CURIAM.—While a member of the Supreme Court Commission, Judge BLACK wrote an opinion which was taken and has been held under advisement by the court. That opinion is now adopted as the opinion of the court, and upon the reasoning therein the judgment is reversed, at the cost of appellees, and the cause remanded, with instructions to the court below to state conclusions of law in accord with the opinion, and render judgment accordingly. The following is the opinion, *viz.* :

BLACK, C.—The appellant sued the appellees, the complaint being in two paragraphs, the first for the recovery of the possession of certain land, eighty acres, in Benton county, and damages for its detention; the second for the quieting of the title of the plaintiff to the same land against adverse claim of the defendants.

The defendants answered jointly by general denial. The defendants Mary P. Goodrich, Elizabeth E. Goodrich and Edward E. Goodrich filed a cross complaint seeking the quieting of their title to forty acres of said land, and the defendant Melville C. Smith filed a cross complaint for like relief as to the remaining forty acres of the land described in the

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complaint. The plaintiff filed denials. The cause was tried by the court, and a special finding was rendered.

The question whether the court erred in its conclusions of law is the only one before us.

The court stated the facts, in effect, as follows :

January 22d, 1858, the United States conveyed by patent to the State of Indiana the real estate described in the complaint, with certain other real estate, as swamp and overflowed lands, under the act of Congress of the United States of September 28th, 1850.

July 1st, 1879, in consideration of one hundred dollars then paid by the plaintiff to the treasurer of said county, he executed to the plaintiff a certificate showing the receipt by said treasurer from the plaintiff of said sum as the purchase-money for the land described in the complaint, and stating that the receipt of said purchase-money entitled the plaintiff to a deed from the State of Indiana for said land on presentation of this certificate to the treasurer of said State. Said certificate, set out in the finding, was in the form prescribed by section 9, 1 G. & H. 598.

No patent or deed had been issued by this State to the plaintiff for said land, and the plaintiff had no title to said land except such as she may have derived by virtue of said certificate.

The United States, through the Department of the Interior, under an act of Congress, of September 28th, 1850, entitled "An act granting bounty land to certain officers and soldiers who have been engaged in the military service of the United States," issued, on the 26th of May, 1851, to Henry Day, who had been a soldier in the Florida war, a military warrant, numbered 4264, which entitled him "to locate one hundred and sixty acres, at any land-office of the United States, in one body and in conformity to the legal subdivisions of the public lands, upon any of the public lands subject to entry at private sale." This land warrant was assigned by said Day to Henry L. Ellsworth, on the 14th of

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April, 1852; and said Ellsworth, on the 19th of June, 1852, located said land warrant, at the land office at Crawfordsville, Indiana, on two adjoining half-quarter sections, one of them being the land described in the complaint. Said Day filed a *caveat*, alleging that the assignment of said warrant to Ellsworth had been procured by fraud, but withdrew the same, and, on the 3d day of May, 1853, again assigned the warrant to Ellsworth. On the 9th of May, 1853, the commissioner of the general land-office, on account of said *caveat*, its withdrawal and said reassignment of said warrant, directed the register and receiver of the land-office at Crawfordsville, Indiana, to cancel said location of said warrant, and to relocate the same upon the same lands in the name of said Ellsworth, the assignment of said warrant by said Day on the 3d of May, 1853, being recognized as a valid one. On the 17th of May, 1853, said Ellsworth, at said land-office at Crawfordsville, again located said warrant upon the same lands, and a proper certificate of such location was duly issued to him.

The Governor of the State of Indiana executed to the United States a certain release or conveyance, which was mailed at Indianapolis on the 17th of January, 1860, and received at the general land-office of the United States on the 20th of January, 1860, which reads as follows:

“To all to whom these presents shall come, greeting: Know ye that whereas, under the provisions of the act of Congress, approved September 28th, 1850, entitled, ‘An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits,’ the register and receiver of the United States land-office at Crawfordsville, Indiana, upon evidence presented to them by the authorized agent of said State, reported to the commissioner of the general land-office the following described tract, piece or parcel of land:” (describing the land mentioned in the complaint herein) “as ensuring to said State under the law aforesaid; and whereas the said tract, piece or parcel of land hereinbefore described, was located by H. L. Ellsworth, on the 17th of May, 1853, with

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warrant 4264, act of 1850; and whereas, on the 24th of August, 1857, the said tract of land was approved to the said State of Indiana by the secretary of the interior in a list, No. 3, for the Indianapolis district; and whereas, on the 22d of January, 1858, the said tract of land was patented to the said State in patent No. 3, for said Indianapolis district, as coming to her under the said act of 1850; and whereas, by an act of Congress, approved March 2d, 1855, entitled, 'An act for relief of purchasers and locaters of swamp and overflowed land,' it is directed 'that the President of the United States cause patents to be issued as soon as practicable to the purchaser or purchasers, locater or locaters, who have entries of the public lands claimed as swamp lands, either with cash or with land warrants or the script, prior to the issue of patents to the State or States, as provided for by the second section of the act, approved September 28th, 1850, entitled, "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," any decision of the secretary of the interior or other officer of the government of the United States to the contrary notwithstanding:' Now, therefore, be it known that I, A. P. Willard, Governor of the State of Indiana, by virtue of the authority in me vested, in consideration of the premises, and in order to enable the United States, in compliance with the foregoing recited provisions of the said act of Congress, approved March 2d, 1855, to issue a patent to the party who made the aforementioned entry, do hereby release and forever relinquish unto the United States of America all right, title, claim or interest of any kind whatsoever of the said State of Indiana, in and to the land hereinbefore described, and every part and portion thereof acquired under or by virtue, either of the aforesaid selection and approval or the patent heretofore issued to the said State, intending hereby to restore this land back to the control of the United States as fully as if said approval had never been made or said patent issued.

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"In testimony whereof, I have hereunto subscribed my name and caused to be affixed the seal of the State of Indiana, at Indianapolis, this, — day of —, 1859.

"By the Governor. ASHBEL P. WILLARD, Governor.

"Attest: C. L. DUNHAM, Secretary of State."

On the 1st of February, 1860, the United States issued a patent to Henry L. Ellsworth for the land described in the complaint, pursuant to the relocation of said land warrant on the 17th of May, 1853, and said patent was not put on record in the recorder's office in Benton county.

On the 4th of October, 1852, said Ellsworth conveyed by warranty deed the land described in the complaint, with other lands, to Chauncy A. Goodrich, for the expressed consideration of one dollar, which deed was duly recorded in the proper deed record. Said Ellsworth died in December, 1858, intestate as to his lands in Indiana. Said Chauncy A. Goodrich died in 1860, and whatever title he had in said land vested in his two sons, Chauncy and William H. Goodrich. Said son Chauncy Goodrich died in 1862, and whatever title he had in said land vested in his widow, Elizabeth E., and his son, Edward E. Goodrich, two of the defendants. On the 10th of May, 1863, said William H. Goodrich and wife and said Elizabeth E. and Edward E. Goodrich by deed conveyed whatever title they had in the east one-half of the land described in the complaint to Erastus N. Smith, and this deed was duly recorded. Said Erastus N. Smith and wife, on the 9th of September, 1870, by deed conveyed whatever title he had in said land to the defendant Melville C. Smith. This deed was properly recorded. In August, 1874, William H. Goodrich died, and his interest in the west half of the lands described in the complaint vested in his widow, the defendant Mary P. Goodrich.

At the commencement of this action, and for five years prior thereto, said defendant Melville C. Smith was and had been in possession of said east half of the lands described in the complaint, making some improvements thereon, and said

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defendants Mary P., Elizabeth E. and Edward E. Goodrich, at the commencement of this action, were, and for five years previously had been, in possession of the west half of said lands described in the complaint, making some improvements thereon. None of the parties to this action have any right, title or interest in or to the real estate in controversy, except such as they may have from the facts above stated.

As conclusions of law from these facts the court stated:

"1. That the plaintiff Sallie A. Matthews has no title whatever to said real estate.

"2. That the defendant Melville C. Smith is the owner in fee simple of said east half of the land mentioned in the complaint, describing it.

"3. That said defendants Mary P. Goodrich, Elizabeth E. Goodrich and Edward E. Goodrich are the owners in fee simple as tenants in common, in the proportion of one-half in said Mary P. and one-fourth each in said Elizabeth E. and Edward E., of said west half of the lands described in the complaint, describing the same.

"4. That the plaintiff's claim of title, on account of her said purchase of said land as swamp and overflowed land from the treasurer of said county, is a cloud upon the said titles of said defendants. Wherefore the court finds for the defendants upon the plaintiff's complaint. The court further finds for the defendant Melville C. Smith on his cross complaint, that his title to the real estate therein described should be quieted. The court further finds for the defendants Mary P., Elizabeth E. and Edward E. Goodrich on their cross complaint, that their title to the real estate therein described should be quieted."

It is insisted on behalf of the appellees that the special finding can not be regarded as constituting part of the record.

It appears to have been made upon the request of the defendants, and it was signed by the judge. It is contended that it was necessary for the court to order expressly that the finding should be made a part of the record. The learned coun-

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sel seem to have taken this position through their belief that this court has recently so decided; but the reverse of this is true. *State, ex rel., v. St. Paul, etc., T. P. Co.*, 92 Ind. 42. See *McClellan v. Bond*, 92 Ind. 424; *McFadden v. Wilson*, 96 Ind. 253.

By section 11 of the act of our General Assembly to regulate the sale of swamp lands, etc., approved May 29th, 1852, 1 G. & H. 599, said county treasurer's certificate of entry was made evidence of title to the land mentioned therein in the person in whose name it issued; it was evidence of legal title. *Edmondson v. Corn*, 62 Ind. 17.

By the act of Congress of September 28th, 1850, R. S. of U. S., section 2479, a copy of which is inserted on page 737, 1 G & H., the whole of the swamp and overflowed lands within this State, made unfit thereby for cultivation, which remained unsold at the passage of that act, were thereby granted to this State. The terms of the act before the fourth section referred to the State of Arkansas. By the fourth section the provisions of the act were extended to all the other States of the Union. By the second section of this statute, it was made "the duty of the secretary of the interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the Governor of the State of Arkansas, and, at the request of said Governor, cause a patent to be issued to the State therefor; and on that patent, the fee simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the Legislature thereof."

The secretary of the interior did not perform his duty according to the terms of the statute, but lists were otherwise made, and it appears by the special finding that, on the 22d of January, 1858, the United States conveyed by patent to this State the land in controversy, as swamp and overflowed lands, under said act of Congress. It has been held uniformly by the courts that said act of Congress was a grant *in presenti*.

In *Fletcher v. Pool*, 20 Ark. 100, it was said that said act

was a present grant, vesting in the State, *ex proprio vigore*, from the day of its date, title to all the land of the particular description therein designated, wanting nothing but the definition of boundaries to make it perfect. It was held that a State statute of January 11th, 1851, providing "that the board of swamp land commissioners are hereby empowered to demand of, and receive from, the proper accounting officers of the United States, indemnity, at the rate of one dollar and twenty-five cents per acre, for any swamp and overflowed lands within this State, which have been sold or disposed of by the United States, since the 28th day of September, 1850, or which may hereafter be sold, and disposed of by the United States," was not a confirmation of the title in a person to such lands purchased by him from the United States after the passage of said act of Congress.

In speaking of the purport of said State statute, it was said: "Portions of the swamp and overflowed lands had been sold by the United States, through the inadvertence of her officers, or from an erroneous opinion entertained as to the rights of the State. The purchasers were without title, and the United States had their money. The State had received nothing for her lands, and had not parted with her title." And it was held that a purchaser from the United States could derive no title directly from said State statute, though he might do so indirectly, by showing that the State had received the indemnity mentioned in that act, provided no private rights had attached in the meantime by purchase from the State; that the receipt of the indemnity by the State would be treated in equity as a sale of the lands by the State to the United States, and the title thus acquired by the United States would enure, by way of estoppel, to her grantee. In that case Pool, the plaintiff, who had entered, on the 10th of January, 1851, at the United States land-office, and received a certificate of entry, was held to take nothing as against one who entered at the State swamp land office afterwards, in 1851, knowing that the land had been previously entered by Pool.

In *Whiteside County v. Burchell*, 31 Ill. 68, it was held that the lands were granted unconditionally to the State, in fee simple, "to be at the uncontrolled disposal of its Legislature."

In *Dart v. Hercules*, 34 Ill. 395, it was held that the act of Congress vested the legal title of such lands as were selected and appropriated under its provisions in the State.

In *Allison v. Halfacre*, 11 Iowa, 450, it was held that the act of Congress granting swamp lands to the State operated, *ex proprio vigore*, to pass the title at once; that the subsequent selection and patenting were required for the purpose of fixing their location and description.

In *Fore v. Williams*, 35 Miss. 533, it was held that the act of Congress was a legislative grant, taking effect upon all the lands referred to from the date of its passage. In that case the plaintiff held by patent from the State, of March 20th, 1855; while the defendant claimed under receipt of the register of the land-office for money paid by defendant for the entry of the land at that office, dated November 3d, 1854. The list of swamp lands was approved by the secretary of the interior January 31st, 1855. The court sustained the plaintiff's claim of title. In that case it was held that no patent was necessary to convey the lands to the State.

In *Funston v. Metcalf*, 40 Miss. 504, it was held that without the approval of the secretary of the interior expressly appearing in evidence, or by necessary inference from a patent to the State for the particular land in controversy, no title vested in the State and none could be conveyed by the State. There the particular land had been omitted from the list of lands reported by the commissioners appointed to select swamp lands for the State to the commissioner of the general land-office of the United States, before its approval by him, on the ground that the land had been purchased previously, on the 15th of October, 1851, from the United States by one under whom the defendant claimed.

In *Edmondson v. Corn*, *supra*, this court said: "The acts

of Congress upon the subject of swamp lands, by their own force, conveyed the title to the State." See, also, *Murphy v. Ewing*, 23 Ind. 297; *Nitche v. Earle*, 88 Ind. 375; *Hamilton v. Shoaff*, 99 Ind. 63.

The decisions of the Supreme Court of the United States have controlling force in the interpretation and construction of acts of Congress. *French v. Fyan*, 93 U. S. 169, was ejectionment. The land was certified in March, 1854, to the Missouri Pacific Railroad Company, as part of the land granted to aid in the construction of said road, by the act of Congress of June 10th, 1852; and the plaintiff, by purchase made in 1872, became vested with such title as this certificate gave. To overcome this *prima facie* case, defendant gave in evidence the patent issued to Missouri in 1857, under the swamp land act, and it was admitted that defendant had a regular chain of title under this patent. The plaintiff offered to prove that the land was not wet and unfit for cultivation. The court said: "This court has decided more than once that the swamp land act was a grant *in presenti*, by which the title to those lands passed at once to the State in which they lay, except as to States admitted to the Union after its passage. The patent, therefore, which is the evidence that the lands contained in it had been identified as swamp lands under that act, relates back and gives certainty to the title of the date of the grant. As that act was passed two years prior to the act granting lands to the State of Missouri, for the benefit of the railroad, the defendant had the better title on the face of the papers, notwithstanding the certificate to the railroad company for the same land was issued three years before the patent to the State, under the act of 1850. For while the title under the swamp land act, being a present grant, takes effect as of the date of that act, or of the admission of the State into the Union, when this occurred afterwards, there can be no claim of an earlier date than that of the act of 1852, two years later, for the inception of the title of the railroad company."

It was held that the second section of the act of 1850 devolved on the secretary of the interior, as the head of the department which administers the affairs of the public lands, the duty, and conferred on him the power, of determining what lands were of the description granted by that act, and made his office the tribunal whose decision on that subject was to be controlling.

In *Martin v. Marks*, 97 U. S. 345, it was said: "The title related to the date of the grant, namely, September 28th, 1850, and superseded any subsequent grant or evidence of title issuing from the United States."

In *Rice v. Sioux City, etc., R. R. Co.*, 110 U. S. 695, what was said in *French v. Fyan, supra*, concerning States admitted after the passage of said swamp land act of 1850, was spoken of as not being necessary to the decision of that case, and was disapproved, it being held that said act of 1850 related only to States in existence when it passed. It was said, per WAITE, C. J.: "That the swamp land act of 1850 operated as a grant *in præsenti* to the States then in existence of all the swamp lands in their respective jurisdictions is well settled."

The fact that a patent was issued to this State by the United States in 1858 for the land in dispute, as swamp and overflowed land, under the swamp land act of Congress of 1850, is, under the cases which we have cited, conclusive evidence that this particular land was selected for the State, as such swamp land, and that the selection was approved by the proper authority, and establishes title to the particular land in this State, commencing on the 28th of September, 1850. It follows that the State's grantee has the title to said land, and that the evidence of adverse title received from the United States since that date, through which the appellees claim, is of no avail against the title so acquired under said swamp land act, unless it appears that the State has relinquished its title to the United States. The possession of the appellees could not be notice of a better title than they had.

If the Governor could reconvey the land to the United States without a particular recital of power, as to which we make no decision, he could not so reconvey without authority from the Legislature. His general authority as an officer of the State included no such power. The learned and careful counsel for the appellees have not been able to refer to any statute conferring such authority, and we have not been able to find such a statute. Counsel do not contend that the general authority of the Governor embraces power to convey the State's lands, nor that he had any express legislative authority. But it is thought by them that the intention of the United States and of this State to do equity to *bona fide* locators of swamp lands, as lands of the general government, who became such after the passage of the swamp land act of 1850, "while the title was in doubt, because it had not been ascertained what lands were wet," may be gathered from the legislation of Congress and of the State, and that, in view of such legislation, the State is estopped to claim that the release signed by the Governor was unauthorized, and that such release was a sufficient expression of the consent of the State to authorize the United States to issue the patent to Ellsworth. We think that the Governor's deed, being outside of his official duty, was of no validity, and that if the location of the land by Ellsworth, and the issuing of the patent in his name, conferred any interest in the land, it must be because of something in itself sufficient for such a result, unaided by the Governor's deed.

It is true that because of want of prompt performance by the secretary of the interior of the requirements of section 2 of the swamp land act of Congress of 1850, and the failure to discontinue the entering of lands at the land-offices of the United States, together with misapprehension of the exact legal rights arising under said act of Congress, there resulted confusion and the purchasing and locating at those offices of some of the lands which, by the terms of that statute, belonged to the State. This was true elsewhere, as well as in Indiana.

Matthews v. Goodrich et al.

And in view of this, Congress enacted statutes which provided for reimbursing the States for lands so entered, and for the making of patents to the purchasers and locators. And this State, manifesting from the beginning and constantly an intention to preserve to itself all the benefits of said grant, passed statutes providing for the collection from the general government of compensation for lands so entered. But there was no act of our Legislature which can be construed as contemplating a release of the State's title to any of said lands without such compensation for the lands released, and there was no act of Congress showing a contrary purpose on its part.

The statutes to which we have been so referred by counsel are the acts of Congress of March 2d, 1855, and March 3d, 1857 (R. S. U. S., sections 2482, 2483, 2484), and the acts of our General Assembly of February 14th, 1851, section 15 (Acts 1851, p. 110), May 29th, 1852, June 14th, 1852, March 4th, 1853, section 3, March 5th, 1855, March 5th, 1857, section 2 (1 G. & H. 597 to 609).

We may mention also the act of March 6th, 1865, Acts 1865, Reg. Sess., 47, which, recognizing the fact that the United States conveyed to this State by deed dated November 7th, 1857, about four thousand acres of land, in lieu of land that had been entered at land-offices in this State while the selection of lands was being made and after the passage of the swamp land act of Congress, empowered the State auditor and treasurer to sell the lands so conveyed, under the rules and regulations of the swamp land act of May 29th, 1852, *supra*.

If for any particular lands of those granted by the swamp land act of 1850 the State thus received compensation instead of the lands, this fact, in view of such legislation, would prevent the State's grantee from questioning a title derived from the United States to such particular lands. But while this does not appear to be true in reference to the particular land in controversy, it does affirmatively appear that as late as 1858

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the State received from the United States a patent for this particular land. This indicates that the United States did not give, and that the State did not accept, money or other land or any consideration instead of said particular land.

If, as seems to be supposed by counsel, the fact that land so granted to the State was not selected as swamp land until after it was entered as land of the general government, could affect the title of the State, without a showing that the State has received compensation from the United States for the land in question or has reconveyed it to the United States, a supposition which the authorities do not sustain, it would be needed, as against the State's grantee, that such fact should be found. When the United States issued a patent pursuant to the location of the land warrant, the selection for the State had been approved and a patent had been issued, pursuant to the act of Congress, to the State.

While it appears that the State acquired an absolute title to the land in dispute, it does not appear that it has parted with that title except to the appellant.

Upon these considerations we are of the opinion that the conclusions of law stated by the trial court were erroneous.

Filed May 15, 1885; petition for a rehearing overruled Nov. 4, 1885.

No. 11,682.

POUDER ET AL. v. RITZINGER ET AL.

MORTGAGE.—Cancellation.—Taking New Mortgage Will not Discharge Lien of First.—The taking of a new note and mortgage by a mortgagee from a mortgagor, for the same debt, upon the same land, will not discharge the lien of the first mortgage, but such lien will be continued in the new mortgage, even if the first be cancelled.

SAME.—Married Woman.—Judicial Sale.—Act of March 11th, 1875.—Foreclosure.—Where a mortgage was executed by a husband alone prior to August 24th, 1875, the date of the taking effect of the act of March 11th, 1875, in relation to the rights of a married woman upon a judi-

109	571
126	218
126	433
102	571
129	462
102	571
133	114
102	571
139	348

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cial sale of her husband's lands, and after the taking effect of such act said mortgage is cancelled and a new one for the same debt executed by such husband upon the same land, the mortgagee's rights upon foreclosure remain as they were prior to such act.

From the Marion Superior Court.

B. Harrison, C. C. Hines, W. H. H. Miller, J. B. Elam, C. A. Ray, F. Knefler and J. S. Berryhill, for appellants Tate.

W. D. Bynum and A. T. Beck, for appellants Pouder.

PER CURIAM.—While a member of the Supreme Court Commission, Judge BICKNELL wrote an opinion reversing the judgment in the above entitled cause. That opinion, until now, has been held under advisement by the court. It is now adopted as the opinion of the court, and the judgment is reversed at the costs of appellants Pouder and Pouder, and the cause is remanded, with instructions to overrule the demurrer of Frances Pouder to the answer of Warren Tate and wife, to her cross complaint. The opinion is as follows:

BICKNELL, C. C.—In 1871, Milton Pouder and one Jordan owned adjoining tracts of land, and they jointly mortgaged the same to Brock to secure \$8,000, \$4,000 for Pouder and \$4,000 for Jordan. In this mortgage Pouder's wife joined. The \$4,000 were borrowed by Pouder for the purpose of building on his land, and were used for that purpose. In May, 1875, Pouder mortgaged his said land to Tate to secure borrowed money. In this mortgage Pouder's wife did not join.

The act of March 11th, 1875 (Acts 1875, p. 178), in relation to the rights of a married woman upon a judicial sale of her husband's lands, took effect on August 24th, 1875. Therefore, Tate's mortgage was not governed by that act, and a decree foreclosing it would have required the sale of the entire property, if necessary, and the purchaser of the entire property would have taken it subject to Mrs. Pouder's inchoate right to one-third of it, to become consummate if she

should survive her husband. *Helphenstine v. Meredith*, 84 Ind. 1.

When Pouder's mortgage to Brock became due, Pouder was unable to pay his part of it, and it was cancelled, and Pouder and wife, in place thereof, gave Brock a new mortgage for \$4,000, upon his land aforesaid. At the same time Tate, in order to give the new mortgage to Brock the same priority held by the old one, cancelled his aforesaid mortgage, and took a new one from Pouder for the same amount and on the same property as the old one. In this new mortgage to Tate, Mrs. Pouder did not join. This substitution of mortgages occurred on February 12th, 1876. The mortgage last mentioned was foreclosed by Tate, and at the foreclosure sale he and his wife jointly bought in the property and took the sheriff's certificate, showing a sale to them of all Milton Pouder's interest in the premises. The appellees then, as assignees of Brock, commenced the present suit to foreclose the second mortgage given to Brock by Pouder and wife as aforesaid.

Mrs. Pouder filed a cross complaint in which she claimed a decree, that the undivided two-thirds of the mortgaged premises should be first sold to satisfy said mortgage debt, and that if the proceeds of said two-thirds should be sufficient to pay said debt and costs, the undivided one-third should be exempt from sale.

Tate and wife were made defendants to this cross complaint, and they answered it, stating the facts as aforesaid, and averring that the said new mortgages were only continuations and extensions of the same security for the same debts mentioned in the first mortgages, and claiming that the decree of foreclosure ought to require the sale of the entire premises at once, if necessary.

Mrs. Pouder's demurrer to this answer of Tate and wife to her cross complaint was sustained, and Tate and wife accepted and elected to stand by their answer.

The cause was tried at special term upon the other issues,

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and the court, in its decree of foreclosure, ordered that the undivided two-thirds of the premises should be first offered for sale, and if the proceeds thereof should be sufficient to satisfy the judgment, then the remaining undivided one-third should be fully discharged from the claims of the parties, and be vested absolutely in Mrs. Pouder, and that if no bid should be received for said two-thirds, sufficient to satisfy the judgment, then the said mortgaged premises should be offered for sale as a whole.

From this judgment the defendants appealed to the general term; there the judgment was affirmed, and the said defendants appealed to this court. Here the usual error is assigned, but the appellants discuss one only of the errors assigned in the general term, to wit: "That the court in special term erred in sustaining the demurrer of Mrs. Pouder to the answer of Warren Tate and wife to her cross complaint."

Ordinarily, upon the foreclosure of a mortgage of the husband's lands, since August 24th, 1875, his wife, at the foreclosure sale, would become seized of the undivided one-third thereof, and would be entitled to a decree that the other undivided two-thirds be first sold to pay the mortgage debt, and that her undivided one-third be not sold, unless the proceeds of the undivided two-thirds should fail to satisfy the debt. *Taylor v. Stockwell*, 66 Ind. 505; *Elliott v. Cale*, 80 Ind. 285; *Riley v. Davis*, 83 Ind. 1; *Summit v. Ellett*, 88 Ind. 227; *Medsker v. Parker*, 70 Ind. 509; *Leary v. Shaffer*, 79 Ind. 567; *Grave v. Bunch*, 83 Ind. 4; *Hardy v. Miller*, 89 Ind. 440; *Main v. Ginthert*, 92 Ind. 180.

The only question is, whether, by reason of the facts aforesaid, the mortgagees had the same rights in the foreclosure of their mortgages as if the same had been executed before the act of 1875, aforesaid, had taken effect?

This question is settled by the decision of this court in *Walters v. Walters*, 73 Ind. 425, and the cases there cited. The court there said: "Nor do we think that the acceptance of the second mortgage, under the circumstances of the case,

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was an extinguishment of the lien for the purchase-money secured by the first." The court cited with approbation the following language of the Supreme Courts of Massachusetts and California :

"The release of the old mortgage and the making of the new one appear to be parts of one transaction only, and the seizin thereby acquired by Burns, between the release and the new mortgage, was but momentary. Such a seizin would not give his wife a right of dower." *Burns v. Thayer*, 101 Mass. 426. "We regard the cancellation of the old mortgages and the substitution of the new, as cotemporaneous acts. It was not creating a new encumbrance, but simply changing the form of the old. A court of equity, looking to the substance of such a transaction, would not permit a release, intended to be effectual only by force of, and for the purpose of, giving effect to the last mortgage, to be set up, even if the last mortgage was inoperative." *Swift v. Kraemer*, 13 Cal. 526.

In *Packard v. Kingman*, 11 Iowa, 219, it was held that the taking of a new note and mortgage to secure an indebtedness, already existing by note and secured by a mortgage on the same property, does not, even where the first note and mortgage are cancelled, operate to discharge the lien of the first mortgage. The principle of these decisions is recognized in *Jones Mortg.*, sections 924, 927, and in *Story Eq.*, sections 1035c and 1035e.

The foregoing authorities show that the taking of a new note and mortgage by a mortgagee from a mortgagor, for the same debt, upon the same land, will not discharge the lien of the first mortgage, but such lien will be continued in the new mortgage, even if the first mortgage be cancelled. In the present case, therefore, the liens continued to exist as created prior to the statute of 1875, *supra*, and their enforcement by foreclosure was not affected by that act. *Helphenstine v. Meredith*, *supra*.

It follows that the court below in special term erred in sustaining the demurrer of Mrs. Pouder to the answer of War-

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ren Tate and wife to her cross complaint, and that the court in general term erred in affirming the judgment of the court in special term.

The judgment ought to be reversed.

Filed May 12, 1885; petition for a rehearing overruled Nov. 5, 1885.

102 576
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No. 11,880.

KETCHAM v. BARBOUR, EXECUTOR.

SUPREME COURT.—*Assignment of Error.*—*Practice.*—An assignment of error, that "the court erred in overruling the demurrers to the first, second and third paragraphs of the complaint," does not call in question the rulings upon demurrers to each of the paragraphs separately, but all jointly, and if one is good the assignment fails.

SAME.—*Weight of Evidence.*—The Supreme Court will not weigh evidence nor attempt to determine any question in regard to the credibility of opposing witnesses.

PLEADING.—*Complaint on Account.*—*Decedents' Estates.*—A complaint by an executor upon an itemized account, alleging that the defendant is indebted to the plaintiff in a certain sum of money for the rent, use and occupation of certain land belonging to his decedent, is good on demurrer for the want of facts.

From the Vigo Superior Court.

W. Eggleston and *E. Reed*, for appellant.

C. W. Barbour and *A. J. Kelly*, for appellee.

HOWK, J.—The first error of which complaint is made by the appellant, the defendant below, is thus assigned upon the record of this cause: "The court erred in overruling the demurrers to the first, second and third paragraphs of the complaint."

It will be observed that this assignment of error does not call in question the rulings of the trial court upon demurrers to each of the paragraphs of the complaint separately; but the error complained of is the overruling of demurrers to the first, second and third paragraphs of complaint. The record

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does not contain any such demurrers, and, of course, does not show any such ruling as the one complained of here as erroneous. In this court the appellant's assignment of error is his complaint, and it must state, like a complaint in a trial court, the cause or matter complained of with reasonable certainty and precision, and the existence or truth of such cause or matter must, in like manner, be shown by the record. *Hutts v. Hutts*, 62 Ind. 214; *Williams v. Riley*, 88 Ind. 290.

If, however, it were conceded that the record contained the demurrers, and showed the ruling thereon, mentioned in the first alleged error, it is certain that such error would not present the question of the sufficiency of each paragraph of complaint separately, but only of the three paragraphs, jointly considered. In such a case, if either paragraph of the complaint states a good cause of action, the joint demurrer to all the paragraphs is properly overruled, even though the other paragraphs may be clearly insufficient. This is so, we think, whether the question is presented upon a joint demurrer to all the paragraphs of complaint, or by an assignment of error which is founded solely upon the alleged overruling of such demurrer to all the paragraphs jointly. In this case it is not, and can not be seriously questioned that the third paragraph of appellee's complaint states a good cause of action. It is a complaint upon an itemized account, wherein it is alleged that the appellant "is indebted" to the appellee in a certain sum of money, for the rent, use and occupation of certain land belonging to his decedent. Such a complaint shows a present, matured indebtedness, and is sufficient to withstand a demurrer for the want of facts. *Mayes v. Goldsmith*, 58 Ind. 94; *Heshion v. Julian*, 82 Ind. 576. If, therefore, the appellant's demurrers had been, as stated in the first assignment of error, joint demurrers to all the paragraphs of complaint, they were properly overruled, even though the first two paragraphs were clearly bad; and if, as the fact was, the demurrers were separate as to each of the paragraphs, the rulings

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thereon are not called in question by the first assignment of error. Our conclusion is that the question of the sufficiency of the several paragraphs of complaint is not presented for our decision by the appellant's assignment of error.

The only other error assigned by the appellant is the overruling of his motion for a new trial. In this motion the only causes assigned for such new trial were, that the finding and decision of the court were not sustained by sufficient evidence, and were contrary to law. This assignment of error, therefore, presents for our decision this single question, Is there legal evidence appearing in the record which tends to sustain the finding of the court on every material point? We think there is an abundance of such evidence in the record of this cause. This court will not weigh evidence, nor attempt to determine any question in regard to the credibility of opposing witnesses. The rule which governs this court as to these matters, and the reasons for such rule, will be found in many of the reported decisions of the court, and need not be repeated here. *Cox v. State*, 49 Ind. 568; *Rudolph v. Lane*, 57 Ind. 115; *Fort Wayne, etc., R. R. Co. v. Husselman*, 65 Ind. 73.

We have found no error in the record of this cause which authorizes or requires the reversal of the judgment.

The judgment is affirmed, with costs.

Filed Feb. 11, 1885; petition for a rehearing overruled Nov. 5, 1885.

No. 11,871.

STRONG, TRUSTEE, v. MAKEEVER ET AL.

HIGHWAY.—Change of.—Width Must be Given or Order Void.—Evidence.—

Where it does not appear in a transcript of proceedings instituted under 1 R. S. 1852, p. 313, *et seq.*, to have a highway changed and relocated, how wide the highway vacated and the one established are, an

108 578
129 585

102 578
134 247
134 490
134 643

102 578
155 504

102 578
162 257

102 578
165 130

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order locating the highway is void, and the transcript is not competent evidence to show upon what line it was established, nor to overthrow a highway established by twenty years' user.

SAME.—*Highway by Twenty Years' User.*—*Statute Construed.*—Under section 5035, R. S. 1881, it is the twenty years' use of a road that makes it a public highway regardless of its origin, and it is immaterial whether the use is with the consent or over the objections of the adjoining land-owners. Statements in *Board, etc., v. Huff*, 91 Ind. 333, in conflict with this holding, are disapproved.

SAME.—*Power of County Commissioners.*—Such section of the statute does not provide for the changing of highways, nor for the correction of mistakes in locating them, but is limited to roads *used* as highways; and before the board of commissioners can make any order for entering of record, it must be shown that the road is *used* as a highway, and, when resistance is made, such board can not go beyond the way as used for twenty years, and establish it upon a different line.

SAME.—*Former Adjudication.*—*Estoppel.*—A township superintendent of roads filed before the board of commissioners a petition asking that they ascertain and enter of record a certain portion of a highway, which, it was averred, had been in use more than twenty years. A remonstrance was filed, alleging that the road had not been so used, and that it was not upon the correct line. An order was made that the board "finds for the remonstrants and refuses the prayer of the petition," and afterward a motion for a new trial was refused.

Held, that these orders, if in any sense a judgment, will not prevent the county board from afterwards ascertaining and making a record of the highway as established by twenty years' user, nor estop the successor of the road superintendent from objecting to a subsequent application for a change of the road as used to a different line.

From the Newton Circuit Court.

F. W. Babcock, for appellant.

S. P. Thompson and *W. B. Austin*, for appellees.

ZOLLARS, J.—This case was tried in the Newton Circuit Court on a change of venue from Jasper county, where it originated. Section 5035, R. S. 1881, is as follows: "All public highways which have been or may hereafter be used as such for twenty years or more shall be deemed public highways; and the board of county commissioners shall have power to cause such of the roads used as highways as shall have been laid out but not sufficiently described, and such as

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have been used for twenty years but not recorded, to be ascertained, described, and entered of record."

Invoking the exercise of the authority conferred by this statute, appellees filed their petition with the board of commissioners of Jasper county, in September, 1882, stating therein that a certain highway, five and one-half miles in length, partly in Marion and partly in Newton townships, Jasper county, had been laid out forty feet wide, one-half on either side of the line dividing certain named sections of land; that for twenty years this highway, thus laid out, has been used and travelled as such, and that it has not been recorded as a highway. It is further stated, that some of the adjoining land-owners, during that year, had encroached upon the highway by putting their fences thereon. Against this, the petitioners enter their protest, and ask that the board of commissioners ascertain what portions of the highway have not been properly recorded, and ascertain and enter said highway of record, so that the existence thereof may be preserved, and the proper road superintendent be enabled to take charge of and keep in repair said highway, etc.

William D. Saylor, superintendent of roads in Newton township, appeared in the commissioners' court and objected to the making of the order as asked by the petitioners, so far as it might affect the highway in that township. In his written objections, he stated that the highway, in that township, had not been laid out on the section line as stated in appellees' petition; that there was a public highway in that township near the said section line, and parallel or nearly parallel therewith, which had been used continuously for more than twenty years as a public highway, the boundaries of which were easily ascertainable by the fences which had been maintained on either side from the time the road was opened; that large sums of public money had been expended upon the highway in the way of clearing, grades, fills, ditches, bridges, etc., and that the way could not be changed without materially affecting public and private rights, etc. There

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being no issue as to that portion of the highway in the other township, an order was made that it be recorded, etc. As to the portion in Newton township, the answer and remonstrance of the superintendent tendered an issue which was tried by the board and decided against him, and an order made that the record should be made as asked by the petitioners, and that the superintendent of roads should keep the highway open for travel, etc. From this order the superintendent appealed to the circuit court. His office, in the meantime, having been abolished, appellant, as the township trustee, was substituted. A like judgment was rendered in the Newton Circuit Court, and from this appellant prosecutes this appeal.

For a reversal of the judgment, appellant relies upon the alleged error of the court below in overruling his motion for a new trial. For the purpose of showing that the west mile of the highway in Newton township had been established upon the section line, as averred in their petition, appellees read in evidence, over appellant's objections and exceptions, a transcript of proceedings by the board of trustees of Newton township, in 1856. That was a proceeding instituted under 1 R. S. 1852, p. 313, *et seq.*, to have a highway changed and relocated. It nowhere appears in that transcript how wide the highway was, which it was sought to vacate, and what is more important and fatal, it nowhere appears in the transcript how wide the highway was which the trustees attempted to establish. For this reason, the final order of the trustees locating the highway was absolutely void, and the transcript was not competent evidence. *White v. Conover*, 5 Blackf. 462; *Carlton v. State*, 8 Blackf. 208; *Barnard v. Haworth*, 9 Ind. 103; *DeLong v. Schimmel*, 58 Ind. 64; *State v. Schultz*, 57 Ind. 19; *Erwin v. Fulk*, 94 Ind. 235.

The admission of the transcript in evidence was such error as requires a reversal of the judgment, but as some other questions are presented by the record, which would necessa-

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rily arise again upon a re-trial, we proceed to examine and decide them.

As will be seen from the statement of the case, the controversy is about the two miles of the road in Newton township, and more especially about the west mile. Just when the east mile of this portion of the road was opened for travel is not shown by the record, but it was prior to 1857. In 1857, the west mile was opened for travel, and thus there was a continuous line of road, forty feet wide, from the east line of the township, two miles west, or nearly west. At the east end, or township line, the center of the road is on the section line as that line was fixed by a survey in 1879. At the west end of the first mile from the east, the center of the road is about two feet north of the section line. At the west end of the two miles, the entire highway of forty feet is north of the section line. In order to make the west mile available, it was necessary to clear away timber and underbrush, grade down a hill or elevation, make an embankment through a morass, cut ditches along the side of the road for a part of the way, and to construct bridges over the ditches, all of which was done soon after the road was opened. This portion of the road was opened with the knowledge and consent of the adjacent land-owners, all of whom still own the land, except appellee Daniel S. Makeever, who has since bought one of the adjoining tracts of land. These land-owners directed that the road should be so located that the center of it should correspond with the east and west fence dividing their lands, which fence they supposed stood upon the section line. They supposed too, that the road was being thus located in accordance with the order of the board of township trustees, for which order they had petitioned. Upon their petition also, another highway was abandoned in order that this might be opened. When the road was opened, they moved their partition fence and built fences on either side of the road, and twenty feet from the center of it. From that time until this proceeding was commenced, more than

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twenty-five years, with a slight interruption which we shall mention, these fences have been maintained, and this highway, thus opened and constructed, has been open for travel, and has been worked and kept in repair by the public authorities. To change the highway so as to put the center of it upon the section line as that line was fixed by the survey in 1879, and as the order of the court below would require, would necessitate another grade of the hill or elevation, the construction of a new fill through the morass, which, for a part of the way, would fall upon the line of one of the side ditches, the removal of fruit and other trees, and the destruction of rows of hedge.

In 1868, an unofficial survey showed that the section line at the west end was south of the road. In 1874, Benjamin, who owned land adjacent to the road for a quarter of a mile on the south, moved his fence south so as to throw out twenty feet of ground. The supervisor, on one occasion, did some plowing upon the land thus thrown out, but, upon being informed by the township trustee that it was not a part of the highway, abandoned it. The old road, however, was in no way abandoned. In 1882, Benjamin removed his fence north, and placed it on the line where it had stood since the road was opened. At some time subsequent to the survey of 1868, appellee Daniel S. Makeever objected to any work being done on the road north of a line twenty feet north of the section line as fixed by that survey. Whether his objection was first made in 1868, 1870 or in 1874 is not definitely fixed by the evidence, although the decided preponderance is in favor of 1874. For the purposes of this case we give to appellees the benefit of the doubt, and regard the objection as having been first made in 1868. Nothing more positive or aggressive was done by Makeever until the spring of 1882, when he moved his fence south and placed it on a line about twenty feet north of the section line as fixed by the survey of 1868. Whether or not the fence interfered with the travelled way, is not shown by the evidence. Within a

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week or two he removed the fence and placed it on the line where it had been from the time the road was opened in 1857. Thus it will be seen that the road, as located and opened in 1857, was continuously used as a highway until the spring of 1882, at least twenty-five years, without any interruption other than the verbal objections by Daniel S. Makeever. If these objections were made as charged, the most that can be said for them is, that the holding by the public was adverse during the time they were being made, because during all that time the public authorities were claiming the right, and the public were using as a highway the road as opened in 1857. We are unable to perceive how this adverse holding can be of avail to appellees. It rather militates against them and the claims they now make.

It is made very plain by the evidence, that the road, as opened in 1857, had been used, with the knowledge of appellees, as a public highway for more than twenty-five years before the proceeding was commenced. By the explicit and positive terms of the statute, that use made the road a public highway. Under this statute, it is the twenty years' use that makes the road a public highway, and it is immaterial whether the use is with the consent, or over the objections, of the adjoining land-owners. Such is clearly the correct construction of the statute and the previous rulings by this court. *Epler v. Niman*, 5 Ind. 459; *Hays v. State*, 8 Ind. 425; *State v. Hill*, 10 Ind. 219; *Lemaster v. State*, 10 Ind. 391; *Hart v. Trustees, etc.*, 15 Ind. 226; *Debolt v. Carter*, 31 Ind. 355; *Ross v. Thompson*, 78 Ind. 90; *Kyle v. Board, etc.*, 94 Ind. 115.

If Makeever wished to make the question, that by mistake or otherwise the highway as used was not upon the proper line, he should have pursued the proper legal remedy for the correction of the mistake before the expiration of the twenty years' use. Merely objecting, as he claims to have done, is of no avail after the expiration of that time. With the expiration of the twenty years' use, as in this case, the statute

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intervenes and declares the road to be a public highway regardless of its origin or the mere objections by land-owners. The statute does not affect a remedy merely, but establishes a right. If there were no such statute, the case, as to the existence of the highway, would be a different one. It might then be a case falling within the statute limiting actions for the recovery of real estate to twenty years, and to be governed by the rules applicable to that statute. In such a case, the alleged mistake in the location of the road and the objections by Makeever might be of importance. In such a case, the case of *State v. Welpton*, 34 Iowa, 144, and the other like cases cited by appellees, would be authority. But they are not authority here, and the alleged mistake and the objections are of no importance, because we have not that kind of a case. And if the use had been for less than twenty years, we should have a different case as to the existence of the highway. In such a case, the legal existence of the highway might be dependent upon a dedication by the land-owners, in the consideration of which it would be important to consider the alleged mistake in the location of the road, the objections by land-owners, and whatever else might tend to show or disprove an intention to dedicate the way to the uses of a public highway, as also, whatever might tend to establish an estoppel as against the adjoining land-owners. But that, again, is not the case before us. Whether the adjoining land-owners intended to dedicate to the purposes of a highway the strip of land used, whether there was a mistake in the location of the highway, and whether the highway was used for such a length of time that public accommodation and private rights might be materially affected by an interruption of the enjoyment, are questions which need not be considered, because, regardless of these considerations, the road has been established as a highway by the twenty years' use. It follows that the judgment of the court below is erroneous and must be reversed, because it does not order

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a record of the highway as used, but in effect establishes the highway upon a line different from that established by the use.

The above section of the statute, upon which this proceeding is based, does not provide for the changing of highways, nor does it provide for the correction of mistakes in the location of highways. By its terms, it is limited to roads *used* as highways. Before the board of commissioners can make any order for entering of record, it must be shown that the road is *used* as a highway.

If a highway in *use* has been laid out, but not sufficiently described, or a highway has been used for twenty years, the board may cause the highway to be ascertained, described and entered of record. In either case, the description and record must be of the highway as *used*. This is the plain language of the statute, and a necessity from the nature of the case. The proceeding, as authorized by the statute, is to ascertain, describe and enter of record; highways which have not been described at all, or not sufficiently described and entered of record. In such case, there is nothing to which resort can be had except the highway as *used*. That is the highway to be described and entered of record. Appellees' petition asserts that the highway had been laid out and opened, forty feet wide, one-half on either side of the section line, and as thus opened had been used for twenty years. There is no legal proof that it was thus laid out, because the pretended record of the proceedings before the board of township trustees does not make it, as we have already seen. On the other hand, the uncontradicted testimony is, that the highway, as used, is not one-half on either side of the section line. The evidence not only does not support appellees' case, but overthrows it. Over this uncontradicted evidence the court below ordered the record, not of the highway as used for more than twenty years, but a highway upon a different line. This the court had no authority to do.

Other questions are discussed by counsel, but as they may not arise upon another trial, or, if they should, they will most

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likely be presented in a different shape, we need not extend this opinion to notice them. Upon the cross errors, it is sufficient to say, that in a proceeding of this character, where the existence of a highway is in jeopardy, the township trustee may appear and defend in his official capacity.

The judgment is reversed with costs, and the cause remanded with instructions to the court below to sustain appellants' motion for a new trial.

Filed June 10, 1885.

ON PETITION FOR A REHEARING.

ZOLLARS, J.—As stated in the principal opinion, this proceeding is based upon section 5035, R. S. 1881, which provides that "All public highways which have been or may hereafter be used as such for twenty years or more shall be deemed public highways; and the board of county commissioners shall have power to cause such of the roads used as highways as shall have been laid out but not sufficiently described, and such as have been used for twenty years but not recorded, to be ascertained, described, and entered of record." In that opinion we said: "By the explicit and positive terms of the statute, that (twenty years') use made the road a public highway. Under this statute, it is the twenty years' use that makes the road a public highway, and it is immaterial whether the use is with the consent, or over the objections, of the adjoining land-owners. * * * With the expiration of the twenty years' use, as in this case, the statute intervenes and declares the road to be a public highway regardless of its origin, or the mere objections by the land-owners. The statute does not affect a remedy merely, but establishes a right." These portions of the opinion are vigorously assailed by appellees' counsel. If, in this assault, the logic were as vigorous as some of the statements, we might well hesitate before overruling the petition for a rehearing. Counsel's interpretation of the statute is shown by the following from their brief: "The statute does not say nor mean that the use of land for

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twenty years authorizes that land to be described of record as a public highway. The statute contemplates the creation of a public highway by consent of the land-owners, either by an imperfect record, made perfect by opening and actual use with full knowledge of the land-owners' rights, or a highway by dedication, used as such for twenty years."

Paraphrased and abridged, this interpretation amounts to this, if, with the knowledge and consent of the land-owner, a way has *become* a public highway, by either of the modes named, then, if used as such for twenty years, it shall be deemed a public highway. Such an interpretation, in our judgment, would render the statute utterly meaningless and nugatory.

The difficulty with counsel's position is that the establishment of public highways by proceedings before the county board, and by dedication, is confounded with the establishment of such highways by the twenty years' use under the statute. The words "public highways," as first used in the statute, have more especial reference to highways established by proceedings before the county board. As applied to highways as established by twenty years' use, the meaning of those words would have been better expressed by the word "way" or "road."

In that portion of the section in relation to making the record, it is provided that *such roads*, etc., used as public highways for twenty years, shall be ascertained and recorded; thus showing that "public highways" as used in the first part of the section mean roads, or travelled ways, and not public highways in the full legal sense. All of the provisions of the section of the statute taken together mean, and can only mean, that a way or a strip of land, used as a public highway for twenty years, shall be deemed and become a public highway. This use is to make that a public highway which, but for such use, would not, and could not, be deemed a public highway. If, without and independent of such use, the way is a public highway by dedication or otherwise, then the

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twenty years' use under the statute amounts to nothing; and the statute is a useless enactment. A way may become a public highway by dedication, express or implied, in much less time than twenty years. It was said in the case of *State v. Hill*, 10 Ind. 219, that four or five years' unopposed use of a way by the public may be sufficient to raise the presumption of a dedication.

It is said in argument, that if such twenty years' use may establish a public highway without regard to the consent of the land-owner, it will result that highways may be thus established over the lands of persons under legal disability, such as infants, etc., and that a construction of the statute should not be adopted that might bring about such a result. What would be the result of such use, if the way were over the lands of persons who, during the entire twenty years were under legal disability, is a question not now before us for definite and final decision. We may state, however, that such persons are bound by statutes of limitation and like statutes, unless they are excepted from their operation. And hence it is, that, in almost every instance, they are excepted from the operation of all such and similar statutes. That is so in most if not all the States, and it is so in this State. See, for example, R. S. 1881, sections 296, 615, 901, 2403, 6467.

Under a statute in New York, which provided that "all roads not recorded which have been or shall have been used as public highways for twenty years or more shall be deemed public highways," it was said, in the case of *Davenpeck v. Lambert*, 44 Barb. 596: "That is to say, shall be judged or held to be public highways from the mere fact that they have been used as such for twenty years or more. I agree that if no statute were in the way, the intention of the owner of the land on which the road exists, would control the question whether it had been dedicated to the public for a highway. * * But the mere intention of the owner of the land is not material under the statute referred to. The uninterrupted use of the land as a public highway for twenty years alone, according

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to the statute, constitutes it such a highway. Such a user of land for that period makes it a public highway under the statute, though the owner be a lunatic, an infant or a married woman, and has no knowledge thereof during the entire time. I think such is the obvious meaning of the statute, and that it must be so construed, for the reason that there is no exception in it saving the rights of persons incapable of consenting or who do not consent to the use of their land for a highway."

Under a statute similar in its nature, in that it provided that all streets, roads and alleys within a named village, which have been worked and improved by the trustees of the village, or the commissioners of highways of the village, and are now used as such, shall be deemed public highways, it was said, in the case of *Hickok v. Trustees, etc.*, 41 Barb. 130: "This was a special legislative enactment that all the streets, roads and alleys in that village should be thenceforth public highways, if brought by this act within certain conditions. It is therefore really unimportant, under the special provisions of this statute, to enter upon an inquiry as to what constitutes a highway at common law. * * * The very fact that this *special* statute provides that those streets, roads and alleys *should be deemed highways*, in case they came within the terms of the act, implies and presupposes that at least some of them, by reason of not being laid out in compliance with the statute, and their having been of less than twenty years' use, were *not then* public highways. * * * The character of these streets, roads and alleys is to be determined, not as is urged by discussing the common law or general statute provisions, but by inquiring simply whether as a matter of fact, any particular street or alley comes within the special provisions of the fourth section of the act of 1848."

So, in the case before us, the inquiry is not whether the road has become a public highway under common law rules, by dedication express, or with the knowledge and consent of the land-owners, but whether as a matter of fact it has been used

as a public highway for twenty years, and thus become a public highway under the statute. And so, under a statute like that under discussion, it was said, in the case of *People, ex rel., v. Judges, etc.*, 24 Wend. 491: "This provision does not authorize the commissioners to say what was 'originally intended,' either by the owner of the soil or any one else, in relation to the width or location of the road, any further than such intention has been manifested by permitting the way to be used. It is a power in relation to the road 'as it actually exists, and has existed' for the last twenty years."

In the case of *Hart v. Trustees, etc.*, 15 Ind. 226, cited in the principal opinion, the trial court found the facts specially, that prior to the obstruction sued for in the action, the public had, without interruption, used the road continuously for twenty-one years, *having no right to so use it except from such continued use*. Upon appeal this court said: "We have decided that, 'A road which has been used by the public, continuously, for twenty years, becomes a public highway, and is of no established width by law; but its width, as used at the end of twenty years, can not, legally, be intruded on.' *Epler v. Niman*, 5 Ind. 459. This decision seems to be precisely in point, because, here, the public had used the road without interruption for twenty-one years, hence, it was a public highway under the statute, and its width at the end of twenty years was its established width."

In the case of *Ross v. Thompson*, 78 Ind. 90, it was said, in speaking of the statute under examination: "Where, therefore, there has been twenty years' user, the way is to be deemed a public one, and those asserting rights in it are not bound to show an original intent to dedicate. The law makes the lapse of time sufficient, without any further evidence." The other cases by this court, cited in the principal opinion, give support to our conclusion here, although the main questions for decision were not the same as here.

There are some statements in the opinion in the case of *Board, etc., v. Huff*, 91 Ind. 333, which, if applied to the

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statute under consideration, are not in harmony with the conclusions we have reached in this case. So far as they may be in conflict with our conclusions here, they are disapproved.

In their petition to the county board, appellees allege that the highway they wish to have ascertained and recorded is upon a section line, one-half upon either side thereof, and, as thus located, has been used as a public highway for twenty years. The proof shows, beyond a doubt, that the highway, as thus used, is not upon the section line as alleged, but varies from it. And while appellees, in their petition, allege that the highway as thus used is one-half upon either side of the section line, the theory of their case, aside from the petition, from beginning to end, is, that, as opened and used, the highway is not upon that line, but should be, because it was located there by a proceeding by the board of township trustees in 1857, and because the land-owners, at the time it was opened and they built their fences, supposed that it was being opened, one-half upon either side of the section line. They are seeking to have ascertained, described and recorded, a public highway, not as it has been used for twenty-five years, but as it should have been opened before the user began. They are thus seeking to have done what the county board has no authority to do. The county board, under the statute, may ascertain, describe and enter of record a public highway as used for twenty years, but there is no authority to go beyond the way as thus used. Especially is this so, when there is resistance by any one having the right to resist. The holdings in New York, under a similar statute, have been, that so far as the record goes beyond the way as used for twenty years, it is absolutely void for want of authority. *People, ex rel., v. Judges, etc., supra*; *Cole v. Van-Keuren*, 6 Thomp. & C. 480; *Talmage v. Huntting*, 29 N. Y. 447; *Borries v. Horton*, 16 Hun 139; *Marvin v. Pardee*, 64 Barb. 353.

We need not indicate here, as to whether or not we approve of and will follow those cases to the full extent to

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which they go, but we do approve of them to the extent that when resistance is made, as in this case, the county board can not go beyond the way as used for twenty years. This is as far as we need go in this case. To grant what appellees contend for, would be to hold that under the statute under consideration, and in a proceeding like this, the county board may, over objections, abandon and vacate the highway as used for twenty years, and establish it upon a different line to correspond with what the land-owners may have supposed was the correct line at the time the highway was opened and they built their fences. And in this case, it would be to hold, also, that appellees may ground their petition upon one theory, and succeed upon another and different theory. The statement of either proposition is its own refutation.

Appellees do not dispute, what is established by the evidence without conflict, that the way, as now open, has been used as a public highway for more than twenty years. They go upon the theory, as we have seen, that it was not opened upon the line as fixed by the proceeding by the board of township trustees before the commencement of the user, and they rely upon the record of that proceeding, in part, to establish that fact. When it is admitted, or established, that the way as now open has been used as a public highway for more than twenty years, the record of such proceeding can avail appellees nothing as evidence or otherwise. In the first place, such a record will not be allowed to overthrow a highway established by such user. In the second place, the county board has no authority, over objections, in a proceeding like this, to make a record of a highway different from that shown to have been established by such user. And in the third place, the record would not prove, but would tend to disprove the averments in their petition, that the highway, used as such for more than twenty years, is upon the line therein described. In accordance with appellees' theory, the court charged the jury, in effect, and refused

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everything to the contrary, that this record would control, and fix the highway upon the line therein described, notwithstanding the fact that the highway, used as such for more than twenty years, is upon a different line. Such instructions put the case to the jury upon a wrong theory, did not state the law correctly as applicable to the case, and hence were erroneous. We held in the principal opinion, that the proceeding by the board of township trustees was void, and the record thereof not competent evidence, because the width of the highway was not stated therein. That proceeding, it will be remembered, was to change a public highway. For this reason, appellees' counsel argue at length, that the width of the highway as changed need not be given; that it will be presumed to be of the same width as before the change. And so the court below charged the jury. After an examination of counsel's argument, we see no reason to change our ruling. While such a proceeding is called changing a highway, practically it amounts to vacating one highway and opening another. If the width of the highway as changed is not stated at all in the proceeding, then the question of its width is left to the judgment or to the conjecture of each individual citizen. The highway sought to be changed may be one established by user, where the width is determined by the way actually used. The change may consist in moving the highway a rod or a half mile in any designated direction. After the change is perfected, the old way is closed up and vacated, and it may be plowed over and cultivated and every trace of its width obliterated. Then there comes a controversy as to the width of the changed or new highway, and there is nothing by which its width can be determined. These proceedings can not be left to this kind of uncertainty. The same reasons that require a holding that the width of the highway shall be given in other highway proceedings, require such a holding here. In the record of the proceeding by the board of township trustees under examination, there

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is nothing in the petition, notice nor orders, that gives or indicates the width of the old, or of the highway as changed.

It is further argued by appellee's learned and industrious counsel, that the judgment should be affirmed as to the west mile of the highway in Newton township, because, as to that mile, as they contend, there had been an adjudication. In June, 1882, the superintendent of highways, who was appellant's predecessor in charge of the highways in that township, filed a petition before the county board asking that they send out a surveyor and thus ascertain and enter of record the west mile of the highway (which he averred had been used as such for more than twenty years), so that he might know where and how to improve the same.

Appellee Makeever remonstrated against such action being taken, upon the grounds, substantially, that the highway had not been so used, and that it was not upon the correct line, as fixed by the proceeding by the board of township trustees, etc. The order made by the county board in that proceeding is as follows: "And the board * * * finds for the remonstrant and refuses the prayer of said petition." The superintendent filed what is called a motion for a new trial. No action was taken upon that motion until the succeeding term of the board, at which time this order was made: "And the court, after due consideration, refuses the petitioner's motion for a new trial."

If these orders, in any sense, amount to a judgment, they do not constitute such a judgment as will, in any way, tie up the hands of the county board to afterwards ascertain and make a record of the highway as established by twenty years' user. Nor do that proceeding, and the orders made therein, constitute such an adjudication as will stand in the way of appellant objecting to the making of the order asked by appellees in this proceeding. They are here asking, in effect, that the highway as used shall be so changed as to be upon a different line.

We can not extend this opinion, which has already grown

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long, to elaborate or give more in detail, the reasons of our holding upon this branch of the case. There ought not, we think, to be any misunderstanding as to the scope of the principal opinion; as there stated the trial below was confined to that portion of the highway which is in Newton township. The order for a new trial is, therefore, confined to that portion of the highway.

The petition for a rehearing is overruled.

Filed Nov. 17, 1885.

No. 11,972.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY
COMPANY v. GOODBAR.

RAILROAD.—*Animals.—Fencing.—Complaint.—Defect Cured by Verdict.*—In a complaint against a railroad company to recover the value of stock killed, it is necessary, to be good on demurrer, to aver that the railroad was not fenced at the point where the animals entered; but where, instead of such averment, it is alleged that the road was not fenced at the point where the animals were killed, the defect is cured by verdict.

SAME.—*Private Gate.—Animals Entering Upon Track by.*—A railroad company is not liable to pay for animals that enter upon its track through a gate maintained by the owner for his own accommodation.

From the Montgomery Circuit Court.

A. D. Thomas, for appellant.

T. E. Ballard and M. E. Clodfelter, for appellee.

ELLIOTT, J.—This action was instituted in the circuit court by the appellee to recover the value of fifteen sheep killed by a locomotive of the appellant.

There was no demurrer to the complaint, and the question for consideration is, whether it is sufficient upon objection made after verdict?

The only averment upon the subject of the failure to fence is this: "And at the point where said sheep were so injured and killed as aforesaid, said railroad was not securely fenced in, and such fence properly maintained by the defendant as required by law." Had a demurrer been addressed to the

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complaint it would unquestionably have been held bad, for it is well settled that it is necessary to aver that the railroad was not fenced at the point where the animals entered. *Fort Wayne, etc., R. R. Co. v. Herbold*, 99 Ind. 91, auth. p. 92. But the question here is whether the defect in the complaint is healed by the verdict. There are many defects that a verdict will cure, and we think that the case of *Indianapolis, etc., R. R. Co. v. Petty*, 30 Ind. 261, requires it to be held that the verdict cures the defect in the complaint before us.

The sheep of the appellee were in a pasture adjoining the appellant's track, and entered upon it through a gate opening into the private crossing. The gate was left open by a boy who had passed through a short time before the sheep were killed. The appellee put up the gate and used it for his own accommodation. This evidence will not sustain a recovery. It would be unjust to compel a railroad company to pay for animals that entered upon its track through a gate maintained by the owner for his own accommodation. If the owner desires to use a private way, he, and not the railroad company, should see that the gate is kept shut. It would be unreasonable to require the railroad company to vigilantly watch all the gates along the line of its road, or else pay the owner of the animals for whose use the private way is maintained for all animals killed, but it is not unreasonable to put that burden on the owner who secures the privilege of constructing and using a private crossing. The duty of the railroad company to the public and to third persons is essentially different from that which it owes the person whom it permits to construct and maintain a private crossing for his own benefit, for to the public and third persons it owes a duty to maintain secure fences at private crossings. *Evansville, etc., R. R. Co. v. Mosier*, 101 Ind. 597; *Baltimore, etc., R. R. Co. v. Kreiger*, 90 Ind. 380; *Indianapolis, etc., R. R. Co. v. Thomas*, 84 Ind. 194; *Railroad Co. v. Cunningham*, 39 Ohio St. 327. The reason which supports that doctrine can not apply where the owner of animals sues for injury to them,

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for it is his own act, performed for his own benefit, which makes the fence insecure. But it is unnecessary to further discuss this question, as it received full consideration in the case of *Bond v. Evansville, etc., R. R. Co.*, 100 Ind. 301, and in *Evansville, etc., R. R. Co. v. Mosier, supra*.

Judgment reversed.

Filed Sept. 25, 1885.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—We have again carefully examined the evidence in this case and can find no reason for departing from our former opinion.

The burden is on the plaintiff in all cases of this character to prove that the animals entered at a point where the railroad company was bound to fence, and that at that point there was no fence. It is the place of entry that controls. As said in *Wabash, etc., R. W. Co. v. Tretts*, 96 Ind. 450: "The place of entry is the material question." This is the ruling in many cases. *Fort Wayne, etc., R. R. Co. v. Herbold*, 99 Ind. 91; *Lake Erie, etc., R. W. Co. v. Kneadle*, 94 Ind. 454; *Louisville, etc., R. W. Co. v. Quade*, 91 Ind. 295; *Louisville, etc., R. W. Co. v. Overman*, 88 Ind. 115; *Jeffersonville, etc., R. W. Co. v. Lyon*, 72 Ind. 107; *Toledo, etc., R. R. Co. v. Howell*, 38 Ind. 447. These cases declare that if the place where the animals entered was one which the railroad company was bound to fence, and the place was not fenced, the company is liable, although the place where the animals were killed was securely fenced, but, if the animals entered at a point where the railroad company was not bound to fence, the company is not liable, although the animals were killed at a place where there was no fence. The evidence before us brings the case within this firmly settled rule, for it shows that the animals went upon the railroad at a place where the company was not bound to fence. There is no evidence that the railroad company undertook to maintain gates for the convenience of the appellee, and it plainly appears that it

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was through the gates maintained by him for his own convenience that the animals entered upon the track.

Petition overruled.

Filed Nov. 4, 1885.

No. 12,150.

THE WESTERN UNION TELEGRAPH COMPANY v. WALKER.

TELEGRAPH COMPANY.—*Failure to Transmit Message.—Penalty.—Statute Must be Strictly Construed.*—In an action against a telegraph company to recover the penalty for failing to diligently transmit a message, the statute is to be strictly construed, and the case must be brought fully within its provisions.

SAME.—*Complaint.*—It is not necessary that the exact words of the statute should be used in the complaint; it is sufficient, if words of equivalent meaning are employed.

From the Benton Circuit Court.

J. R. Coffroth, T. A. Stuart and D. Fraser, for appellant.

M. H. Walker and I. H. Phares, for appellee.

ELLIOTT, J.—The only question argued by the appellant's counsel is that arising on the demurrer to the complaint, and, under the well settled practice, all other questions are deemed waived.

Since the preparation of counsel's brief, a correct copy of appellee's complaint has been sent up by a return to a *certiorari*, and from this it appears that the objection urged to the complaint is not well founded. The complaint is based on the statute imposing a penalty on telegraph companies for a failure to diligently and impartially transmit messages, and the objection urged is that it does not aver that the appellant is an "electric telegraph company with a line of wires extending wholly or partly through this State and engaged in telegraphing for the public." The complaint contains these averments: The defendant "is an electric telegraph company duly organized as a corporation, and was, on the 8th day of August, 1884, and ever since that time, engaged in the business of transmitting telegraph messages for the public; that it was, on said 8th day of August, 1884, oper-

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ating a telegraph office in the town of Fowler, Benton county, Indiana, and another in the town of Remington, Jasper county, Indiana; that said defendant was the owner and operator of a line of wires on the said 8th day of August, 1884, extending to and through each of said points, to wit, the town of Fowler, Benton county, Indiana, and the town of Remington, Jasper county, Indiana."

We agree with counsel that the action is one to recover a penalty, that the statute is to be strictly construed, and that a party suing for a penalty must bring his case fully within the provisions of the statute. *Western Union Tel. Co. v. Mossler*, 95 Ind. 29; *Rogers v. Western Union Tel. Co.*, 78 Ind. 169; S. C., 41 Am. R. 558; *Western Union Tel. Co. v. Axtell*, 69 Ind. 199, and authorities cited. We are, however, of the opinion that the appellee's complaint does bring his case within the words of the statute.

It is true that the exact words of the law are not used, but words of equivalent meaning are employed, and this is sufficient. *State v. Miller*, 98 Ind. 70; 1 Bishop Cr. Proc., section 612.

Judgment affirmed.

Filed Sept. 16, 1885.

No. 12,319.

THE STATE, EX REL. HOWARD, PROSECUTING ATTORNEY,
v. THE CRAWFORDSVILLE AND DARLINGTON TURNPIKE
COMPANY.

From the Montgomery Circuit Court.

J. M. Thompson, W. B. Herod, J. H. Burford, W. H. Thompson and F. M. Howard, for appellant.

P. S. Kennedy, S. C. Kennedy, E. C. Snyder, G. W. Paul and J. E. Humphries, for appellee.

Howe, J.—In this case, the same questions are presented for decision, and in the same manner, as those which were considered and decided by this court in *State, ex rel., etc., v. Crawfordsville and Shannondale Tp. Co., ante*, p. 283. For the reasons given in the case cited, this cause must be decided as that was decided.

The judgment is affirmed.

Filed June 10, 1885.

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ATTACHMENT.

See EQUITY, 2, 3; JURISDICTION, 8 to 12.

1. *Garnishee*.—*Affidavit in Garnishment*.—*Verification*.—Where the garnishee receives notice, and there is a conflict of evidence as to whether the affidavit in garnishment was verified, the Supreme Court will not disturb the finding of the trial court upon that question.

Field v. Malone, 251

2. *Same*.—*Rights under General Denial*.—*Burden of Proof*.—A general de-

nial filed by a garnishee in attachment proceedings imposes upon the plaintiff the burden of showing that all of the persons to whom the garnishee is indebted are before the court. *Ib.*

3. *Same.—Effect of Judgment.*—A judgment against the garnishee will protect him against the claims of his creditors in case the court has jurisdiction of the persons of the creditors and jurisdiction of the subject-matter of the action. *Ib.*
4. *Same.—Parties.—Partnership.*—A debtor of the firm of Marshall Field & Co. can not be garnished upon a claim due from him to the firm of Field, Leiter & Co., but if all the members of the firm to whom the garnishee is indebted are before the court, the mistake in giving the name of the firm will not prevent the plaintiff from obtaining judgment against the garnishee. *Ib.*

BAIL.

See HABEAS CORPUS, 3.

BAILMENT.

1. *Agricultural Society.—Liability of, to Exhibitors.*—An agricultural society that invites persons to place property on exhibition at one of its fairs, and promises to take care of articles placed in its charge by exhibitors, is a bailee for hire, and it is responsible for a loss of the property if caused by its negligence in failing to perform the duty created by its promise. *Vigo Agricultural Society v. Brumfield, 146*
2. *Same.—Contract.—Consideration.*—Where parties agree upon a consideration of an indeterminate value, the courts will not disturb the contract upon the ground of inadequacy of consideration, and the act of an exhibitor, in placing his property in charge of an agricultural society in answer to its published invitation and promise to take care of the property, constitutes such a consideration. *Ib.*

BANKS AND BANKING.

See PRINCIPAL AND SURETY; SCHOOLS, 5.

BASTARDY.

See INSTRUCTIONS TO JURY, 2.

1. *Trial in Defendant's Absence.—Judgment.—Case Overruled.*—If a prosecution for bastardy be tried in the absence of the defendant, by reason of escape, and the finding be against him, the statute, section 986, R. S. 1881, requires that the court shall commit him to jail if he do not replevy the judgment, and he may to that end be arrested upon a bench warrant. *Patterson v. Pressley, 70 Ind. 94, overruled. Lucas v. Hawkins, 64*
2. *Rulings after Finding.—New Trial.—Practice.*—In a bastardy case the trial proper ends with the finding that the defendant is the father of the child, and no question will be raised upon a ruling in the proceedings subsequent to such finding by assigning such ruling as a cause for a new trial. *Scott v. State, ex rel., 277*
3. *Same.—Evidence.—Waiver.*—A failure to object to the judgment or to move for its modification is a waiver of any supposed error of the trial court in refusing to hear evidence, offered after the finding, as to the defendant's financial condition. *Ib.*
4. *Same.—Financial Condition of Defendant.—Excessive Judgment.*—The fact that the defendant in a bastardy proceeding has no property, and no means of obtaining money except by his labor, will not justify the reversal of a judgment of five hundred dollars, payable in instalments, for the support of the child. *Ib.*

BILL OF EXCEPTIONS.

See **CRIMINAL LAW**, 14; **PRACTICE**, 15, 23, 25; **SUPREME COURT**, 2, 6.

BILL OF EXCHANGE.

See **PROMISSORY NOTE**.

BONA FIDE PURCHASER.

See **FRAUDULENT CONVEYANCE**.

BOND.

See **DAMAGES**, 1, 2; **GUARDIAN AND WARD**; **INSTRUCTIONS TO JURY**, 2; **JUSTICE OF THE PEACE**; **PRINCIPAL AND SURETY**.

BRIEF.

See **SUPREME COURT**, 10, 11.

BURDEN OF PROOF.

See **ATTACHMENT**, 2; **HABEAS CORPUS**, 4; **MARRIED WOMAN**, 4; **SPECIAL VERDICT**, 1.

CASES OVERRULED, DISAPPROVED, ETC.

Elliott v. Frakes, 71 Ind. 416, and *Armstrong v. Cavitt*, 78 Ind. 482, distinguished in *Lantz v. Maffett*, 23

Patterson v. Pressley, 70 Ind. 94, overruled by *Lucas v. Hawkins*, 64

Bloch v. Isham, 28 Ind. 37, distinguished in *Conduitt v. Ross*, 166

Shattell v. Woodward, 17 Ind. 225, overruled by *Falout v. Board of School Comm'rs, etc.*, 223

Fontaine v. Houston, 58 Ind. 316, criticised and distinguished in *Field v. Malone*, 251

Anderson v. Meeker, 31 Ind. 245, and *Bingham v. Kimball*, 33 Ind. 184, distinguished in *Moyer v. Brand*, 301

Greencastle Township v. Black, 5 Ind. 557, and cases following it, overruled by *Robinson v. Schenck*, 307

Grover & Baker Sewing Machine Co. v. Butler, 53 Ind. 454, overruled by *Brechbill v. Randall*, 528

Board, etc., v. Huff, 91 Ind. 333, disapproved by *Strong v. Makeover*, 578

City of Indianapolis v. Gaston, 58 Ind. 224, followed by *Curthage T. P. Co. v. Andrews*, 138

CHANGE OF VENUE.

1. *Rule of Court.—Diligence.*—An application for a change of venue, filed after the time limited by a rule of the trial court, is insufficient if it does not show the exercise of diligence to discover the fact, upon which it is based, within the time limited. *Ringgenberg v. Hartman*, 537
2. *Same.—Convenience of Witnesses.—Discretion of Court.*—It is within the discretion of the trial court to grant a change of venue on the ground that it is required by the convenience of witnesses, and the Supreme Court will not interfere with its action where an abuse of such discretion is not shown. *Ib.*

CHATTEL MORTGAGE.

See **PARTNERSHIP**; **PLEDGE**.

CITY.

See **SCHOOL COMMISSIONERS**; **SCHOOLS**.

1. *Municipal Corporation.—Incidental Powers.—Sewers.—Contract.*—The authority to construct sewers needed for the drainage of streets is an incidental power of a municipal corporation invested with the gen-

eral power over highways within the corporate limits, and the corporate officers have authority to contract for a right to construct a sewer through private property. *Leeds v. City of Richmond, 372*

2. *Same.—Public Improvements.—Discretion of Corporate Officers.*—It is for the corporate officers, and not for the court, to determine when a public improvement is necessary, and what its general plan and character shall be. *Ib.*
3. *Same.—Eminent Domain.—Contract.—Statute.*—The right to seize private property by virtue of the eminent domain must be conferred upon municipal corporations by statute; but the right to acquire property for corporate purposes by contract need not be expressly conferred by statute, and the delegation of the right to seize property under the eminent domain does not necessarily exclude the right to acquire property by contract. *Ib.*
4. *Same.—Liability of Corporation for Torts and Contracts of Officers.—Sewers.*—Municipal corporations are not responsible for the torts of its officers, nor for breach of contract, when the acts of the officers are beyond the general powers of the corporation; but they are responsible when the acts of the officers are within the general corporate powers, and the construction of a public sewer is an act within the scope of the general powers of a municipal corporation. *Ib.*
5. *Same.—Respondent Superior.—Independent Contractor.—Damages.*—The general rule is that a municipal corporation is not responsible for the negligence of an independent contractor; but this general rule does not apply where the corporation secures a right of way through private property, and expressly contracts to pay all damages occasioned by the construction of the public work; in such a case the maxim *respondent superior* applies. *Ib.*
6. *Same.—Injuries from Negligence not part of Expense of Public Improvement Assessable Against Private Property.—Sewers.—Assessment.*—Damages arising from injuries occasioned by negligence in the construction of a public sewer by a municipal corporation are not part of the expense of constructing the sewer, and can not be assessed against private property, but must be paid out of the general treasury. *Ib.*

COLLATERAL ATTACK.

See DECEDENTS' ESTATES, 2; JUDGMENT; JURISDICTION, 1, 2, 5; RECEIVER, 5.

COMMERCE.

See CONSTITUTIONAL LAW, 3 to 6.

COMMON SCHOOLS.

See SCHOOLS.

COMPROMISE OF CRIME.

See INSTRUCTIONS TO JURY, 5.

CONDITION.

See CONTRACT, 5; DEED, 6 to 9.

CONSIDERATION.

See BAILMENT, 2; CONTRACT, 10, 14; INSTRUCTIONS TO JURY, 5; MARRIED WOMAN, 2, 3, 5; PROMISSORY NOTE, 1 to 3.

CONSTITUTIONAL LAW.

See CRIMINAL LAW, 1; SCHOOLS, 1 to 4; SHERIFF'S SALE, 4, 5.

1. *Right of Courts to Pass on Constitutionality of Statutes.*—The power of the

courts to declare a statute unconstitutional is a high one, is very cautiously exercised, and is never exercised in doubtful cases.

Robinson v. Schenck, 307

2. *Same.—Stare Decisis.*—On constitutional questions the rule of *stare decisis* does not possess the same force as in ordinary cases. *Ib.*
3. *Act Regulating Sale of Patent Rights.*—The statute requiring persons who sell, or offer for sale, patent rights to file with the clerk of the proper county a duly authenticated copy of the letters patent, and an affidavit that the letters are genuine and have not been revoked or annulled, and that they have authority to sell the right patented, is valid. *Breechbill v. Randall, 528*
4. *Same.—Power of State to Make Police Regulations.*—The State has power to make police regulations for the protection of its citizens against fraud and imposition. *Ib.*
5. *Same.—Discrimination.—Restriction upon Commercial Intercourse.*—The State is not inhibited from enacting police regulations which operate upon instrumentalities or articles of commerce, provided no discriminations are made against classes of citizens, and no restrictions are placed upon commercial intercourse. *Ib.*
6. *Same.*—In enacting a statute particularly applicable to one thing of a peculiar nature, there is no discrimination, and no obstruction of commerce. *Ib.*

CONTINUANCE.

Absent Witness Incompetent.—A continuance should not be granted for the absence of a witness, who if present would not be competent to testify if objected to; *e. g.*, a physician whose knowledge of the facts came to him in his professional capacity. *Carthage T. P. Co. v. Andrews, 138*

CONTRACT.

See BAILMENT; CITY; CUSTOM; DEED, 8, 9; FRAUD, 4; INSTRUCTIONS TO JURY, 2, 5; INSURANCE; MARRIED WOMAN; PARTY WALL; PLEADING, 8; PLEDGE; PRACTICE, 11; PRINCIPAL AND SURETY; PROMISSORY NOTE; SCHOOLS, 5 to 10; SCHOOL COMMISSIONERS; SHERIFF'S SALE, 4, 5; STATUTE OF FRAUDS.

1. *Pleading.—Naked Averment of Mistake.*—A naked averment of mistake, without seeking a reformation of the contract, can not avoid the defence created by the agreement. *Mason v. Mason, 38*
2. *Same.—Reformation Should be Asked in Complaint.*—*Semble*, that where the correction of a mistake in a written agreement is necessary to enable the plaintiff to recover, reformation should be asked in the complaint, and not by reply. *Ib.*
3. *Exchange of Lands.—Execution of Deeds.—Oral Agreements.—Merger.*—Where parties negotiate with each other for an exchange of lands, and such negotiations are finally consummated by the execution and interchange of deeds, all oral covenants or agreements of the parties, in relation to their respective lands, which preceded or accompanied the execution of such deeds, are so merged therein that no action can thereafter be maintained on any such oral covenant or agreement for any alleged breach thereof. *Ice v. Ball, 42*
4. *Publication of Offer.—Acceptance.*—Where there is a publication of an offer, the contract is complete when it is accepted, provided the acceptance takes place prior to the withdrawal of the offer. *Vigo Agricultural Society v. Brumfiel, 146*
5. *Sale of Wind-Mill.—Conditions.—Pleading.*—The contract of sale of a wind-mill contained the following stipulation: "If you accept this order and ship me the goods ordered above, it is with the distinct understanding, and is a part of this contract, that if the wind-mill does

not work well for sixty days after erected, I am to notify you and give you ninety days after receipt of such notice by you in which to remedy the defect, and if you can not make it work well you are to remove the wind-mill and release me from the amount which I have paid for said mill as above stipulated." On the reverse side of the contract was written the following, which was signed by the seller's agent: "The condition of this sale is that D. G. erects the mill, and after ninety days, if the mill suits J. C., he agrees to settle on the conditions named in the within order." Action to recover the price of the mill.

Held, that the purchaser did not have the right to arbitrarily say he was not suited and reject the mill, but he was only relieved from keeping it by reason of any defect or failure to perform, which the seller failed, upon notice, to remedy.

Held, also, that a paragraph of answer alleging generally that the "wind-mill did not work well," and another alleging that the plaintiff's agent "wholly failed to cause the same to work sixty days, or any other period of time, or to work at all," and another alleging that it "never did work, never was of any use or value to the defendant, because it would not pump water for stock, nor do any other thing for which it was intended," but each failing to aver the particulars in which it was defective, are not sufficient. *Flint v. Cook*, 391

6. *Construction of.—Mistake.*—In the construction of contracts the leading purpose is to ascertain the true meaning of the contracting parties; but in doing this courts are confined to the contract as written, in the absence of proper averments of mistake. *Beard v. Lofton*, 408

7. *Same.—Decedents' Estates.—Agreement as to Distribution Among Heirs.—Will.*—Under an agreement, signed by the heirs of L., that "in the distribution of" his estate B. "shall receive an equal share with each other child," said B. is entitled to share in the common estate, if any, in which each is entitled to share, and not in personal property and lands which have been disposed of by will to one of such other children. *Ib.*

8. *Same.—"Distribution."—Presumption.*—In the absence of a showing to the contrary, it will be presumed that the word "distribution" was used in the statutory and ordinary sense with reference to the personal property and money arising from the sale of real estate by the administrator, remaining after the payment of debts and legacies. *Ib.*

9. *Same.—Parties.*—In an action by B. upon such contract, all the signers thereto are necessary parties defendants. *Ib.*

10. *Same.—Want of Consideration.—Answer of.*—An answer that the contract sued on was executed by the defendant without any consideration whatever, is sufficient in form and substance. *Ib.*

11. *Descriptive Words.*—Mere descriptive words appended to the name of a party to a contract are, as a general rule, regarded as a description of the person who signs the instrument, but, where the instrument on its face shows that the words are not simply *descriptio personæ*, they will be given their proper force and effect. *Avery v. Dougherty*, 448

12. *Same.—Signing by Agent.*—The lease on which the defence in this case is founded recites that "The said Marshall, agent as aforesaid, has rented to Madison and Monroe Avery," and this recital shows that Marshall was the agent of the lessor, and as such agent executed the lease. *Ib.*

13. *Parol Agreement.—Statute of Frauds.*—A parol agreement between A. and B., that A. will pay or answer for the debt of B., is not within the statute of frauds. *Windell v. Hudson*, 521

14. *Same.—Consideration.—Pleading.*—Where an action is founded upon a

parol promise, it is necessary that the consideration of such promise should be stated with such particularity as will enable the court to decide whether or not it is sufficient. *Id.*

CONVEYANCE.

See DEED; FRAUDULENT CONVEYANCE; HUSBAND AND WIFE; PARTY WALL; SWAMP LANDS.

CORONER'S INQUEST.

See CRIMINAL LAW, 40, 41.

CORPORATION.

See CITY; GRAVEL ROAD; JURISDICTION, 6, 8, 9; MASTER AND SERVANT; SCHOOLS, 5 to 10; SCHOOL COMMISSIONERS.

COUNTER-CLAIM.

See DEED, 9.

COUNTY CLERK.

See CONSTITUTIONAL LAW, 3.

COUNTY COMMISSIONERS.

See DRAINAGE, 3; HIGHWAY; TRESPASS, 1, 2.

1. *Term of Office of Successor Filling Vacancy.*—Where a person who has been elected to and has entered upon a full three-years' term of the office of county commissioner resigns said office, his appointed successor will hold, by virtue of his appointment, for such portion of the remainder of such full term as may elapse before the next general election, and a person elected at such next general election as successor in such vacancy, said full term not then having expired, will hold, by virtue of his election, not for three years from his said election, but for the unexpired portion of such resigned officer's full term.

Furmlater v. State, ex rel., 90

2. *Same.—Election.—Defective Notice.*—Where at a general election a vacancy in the office of county commissioner is to be filled, and there is not also to be an election of a successor for a full term, the fact that the election notice does not show that an unexpired term of such office is to be filled at the election, will not affect the elected commissioner's tenure of office. *Id.*
3. *Same.—Certificate of Election.—Collateral Attack.*—In a proceeding by information to oust an incumbent of an office holding over after the expiration of his term, in favor of another holding a certificate of election as successor of the former, the defendant can not attack such certificate by showing that said holder was not elected to such office, and that a third person was elected. *Id.*

COURTS.

See CONSTITUTIONAL LAW, 1, 2; CONTRACT, 6; CRIMINAL LAW, 1, 2, 18, 27 to 29, 37, 38; DEMURRER TO EVIDENCE; INSTRUCTIONS TO JURY; JUDGMENT; JURISDICTION; RECEIVER; SPECIAL VERDICT; SUPERIOR COURT; SUPREME COURT.

COVENANT.

See DEED; LANDLORD AND TENANT, 2, 5; PARTY WALL.

CRIMINAL LAW.

See FRAUDULENT CONVEYANCE, 1; INSTRUCTIONS TO JURY, 5.

1. *Bill of Rights.—Trial by Jury.—Waiver.*—Under section 13 of the Bill of Rights, in the Constitution of this State, in all criminal prosecutions the accused has the right to a public trial by an impartial jury,

- and this right he can not be deprived of, nor even waive unless such waiver is expressly authorized by statute. *Wartner v. State*, 51
2. *Same.—Capital Cases.—Jury Trial.—Punishment.—Discretion of Jury.—Statute Construed.*—Under section 1821, R. S. 1881, the defendant in a capital case must be tried by a jury; and upon conviction of a capital offence, upon his plea either of guilty or not guilty, it is in the discretion of the jury alone, under the statute, to assess his punishment, either that he suffer death or be imprisoned in the State prison during life. Upon conviction for such an offence the court is not authorized by any statute to assess the punishment without the intervention of a jury; and this is so even where the defendant interposes a plea of guilty. *Ib.*
 3. *"Pimp."—Indictment.—Duplicitv.*—An indictment under section 2002, R. S. 1881, charged that one F., on, etc., did unlawfully frequent houses of ill fame, well knowing them to be such, and did unlawfully frequent houses of assignation, well knowing them to be such, and did unlawfully associate with females known and reputed as prostitutes, viz., with one K. and others whose names are to the grand jury unknown, well knowing them to be such, and was then and there engaged in and about a house of prostitution, he, the said F., then and there being a male person, contrary, etc. On motion to quash, *Held*, that the indictment is not bad for duplicity. *Fahnestock v. State*, 156
 4. *Same.—House of Prostitution.—Question of Fact.*—In a prosecution under such an indictment, the question as to whether or not the house, which the defendant is alleged to have unlawfully frequented, and in and about which he was engaged, was a house of ill fame, assignation or prostitution, in so far as it is of importance in such case, is a question of fact for the jury, to be determined from the evidence. *Ib.*
 5. *Same.—Instruction to Jury.—Prostitute.—Statute.*—In such case an instruction to the jury, that "A female prostitute is a woman who has or holds unlawful sexual intercourse with men; and any act of voluntary sexual intercourse, between an unmarried female and a male person, is whoredom; and a single act of that kind makes a woman a whore or prostitute, these two terms meaning the same thing. And the association of a male person, not her husband, with such a woman, constitutes him a pimp," is erroneous, for the reason that section 2003, R. S. 1881, defines the meaning of the term "prostitute," and the definition given in such instruction is not in harmony with that given in said section. *Ib.*
 6. *Statute.—Definition of Words.*—Where a statute defines words or terms used therein, no wider or different meaning can be given them by any rule of legal construction. *Ib.*
 7. *Involuntary Manslaughter.—Assault and Battery.*—An unlawful assault and battery without a purpose to kill, even where danger to life or serious bodily harm would not be the probable result of the violence, but which does, nevertheless, result in death, is involuntary manslaughter. R. S. 1881, section 1908. *State v. Johnson*, 247
 8. *Indictment.—Description of Property.*—The property which the indictment alleges was stolen by the defendant is thus described: "One book, of the value of six dollars, the personal property of Levi W. Welker." *Held*, that this was a sufficient description. *Turner v. State*, 425
 9. *Same.—Evidence.—Fabrication of Evidence.*—It is a familiar principle that the fabrication of evidence is a criminative circumstance against an accused person, and evidence tending to show that his account of the manner in which he obtained possession of the stolen property was fabricated, is competent. *Ib.*

10. *Same.—Rule where Two Crimes are Connected.*—Although the general rule is that one crime can not be proved in order to establish another, yet, where the two are connected, it is competent to prove both. *Ib.*
11. *Same.—Instructions.*—The following instruction is not erroneous: "The rule of law which clothes every person with the presumption of innocence, and imposes upon the State the burden of establishing his guilt beyond a reasonable doubt, is not intended to aid one who is in fact guilty of a crime to escape, but is a humane provision of law, intended to guard against the danger of any innocent person being unjustly punished." *Ib.*
12. *Same.—Repeating Instructions.*—Where an instruction is given by the court, it is not error to refuse an instruction asked by the defendant asserting the same rule of law. *Ib.*
13. *Same.—New Trial.—Newly Discovered Evidence.*—Where it appears that the newly discovered evidence will not change the result, it is not error to refuse a new trial. *Ib.*
14. *Bill of Exceptions.—Time of Filing.—Practice.*—In criminal prosecutions bills of exceptions must be filed at the time of the trial, or within such time as the court may then allow. Section 1847, R. S. 1881.
Hunter v. State, 428
15. *Same.—Justice of the Peace.—Clerical Error in Transcript.*—Upon appeal to the circuit court from a conviction before a justice of the peace, a mere clerical error in copying the affidavit into the transcript, when shown to be such by the original papers sent up as required by statute, is not available to the defendant. *Ib.*
16. *Same.—Affidavit.—Notary Public.*—An affidavit before a justice of the peace charging felony or misdemeanor need not necessarily be sworn to before the justice, but it may be sworn to before a notary public. Sections 5964 and 6010, R. S. 1881. *Ib.*
17. *Competency of Juror.—Opinion as to Guilt or Innocence.—Conversations with Witnesses.*—An opinion formed from conversations with "witnesses of the transaction" absolutely disqualifies a person from serving as a juror in a criminal cause, but this disqualification applies only to opinions formed from conversations with witnesses to the transaction constituting the *gravamen* of the offence charged, and not to opinions based upon conversations with witnesses to some merely incidental or collateral matter connected with the trial. *Walker v. State, 508*
18. *Same.—Discretion of Trial Court.*—The judge who presides at the trial should be permitted to exercise a large discretion in determining the weight and relative importance which should be given to the answers of a juror to questions touching his qualifications to serve. *Ib.*
19. *Same.—Evidence.—Family Relations of Deceased, etc.—Presumption.*—Where, in a prosecution for murder, a witness testifies to his relationship with the deceased, and also to the family relations and business of the latter, it will be presumed by the Supreme Court, in the absence from the record of the evidence in connection with which such proof was made, that the testimony was properly admitted. *Ib.*
20. *Same.—Previous Moral Character of Defendant.*—In a prosecution for murder, evidence that the previous character of the defendant for peace and quietude was good is admissible, but his previous moral character is not a proper subject of inquiry. *Ib.*
21. *Same.—Difficulty between Deceased and Third Person.*—Evidence that a third person, a short time previous to the homicide, had a difficulty with the deceased, and asked the defendant for his revolver to use upon him, which defendant refused, was properly excluded. *Ib.*

22. *Same.—Immaterial Evidence.—Practice.*—Where offered evidence seems from the record to have been immaterial, it will be presumed that the trial court properly excluded it. *Ib.*
23. *Same.—Insanity.—Can not be Proved by Reputation.*—Insanity is a fact which can not be proved by reputation. *Ib.*
24. *Same.—Partial Insanity.—Instructions.*—For instructions on the subject of partial insanity, see opinion. *Ib.*
25. *Same.—Instructions, How Considered.—Practice.*—An instruction must be considered as a whole, and not in its separate parts, and also in connection with all the other instructions, if any, given at the same time. *Ib.*
26. *Same.—Refusing Instructions Asked.*—It is not error to refuse to give instructions asked when those given by the court sufficiently cover the subject. *Ib.*
27. *Same.—Where Cause is on Trial and Undisposed of at End of Term Court May Sit Beyond Term.*—Under section 325, R. S. 1843, continued in force as section 1379, R. S. 1881, where a cause is on trial and undisposed of at the end of a regular term of court, the court may continue its sitting beyond such term until the cause is fully disposed of. *Ib.*
28. *Same.—Adjournment Before Midnight.—Practice.*—Where at six o'clock on Saturday evening, the last day of a term of court, it is made to appear that the cause can not be disposed of in the six hours remaining of such term, it may be adjourned over until the following Monday, without holding until midnight. *Ib.*
29. *Same.—Imperfect Record.—Amendment Nunc Pro Tunc.*—The power to amend imperfect records of past proceedings extends to criminal as well as to civil proceedings. *Ib.*
30. *Same.—Appeal.—Practice.*—Where, after appeal, the record is found to be imperfect, and proceedings are begun in the trial court for its amendment *nunc pro tunc*, there must be an appeal from the order making the amendment to bring in review the sufficiency of the evidence to sustain it. *Ib.*
31. *Same.—Notice to Defendant in Prison.*—Notice to a defendant while in prison, on conviction of manslaughter, of proceedings by the State to obtain a *nunc pro tunc* entry amending the record, is, from the necessity of the case, sufficient. *Ib.*
32. *Indictment.—Return of.*—Where it appears from the record that an indictment was, on a certain day, returned into open court by the grand jury, endorsed "a true bill" by their foreman, the return is sufficiently shown. *Epps v. State, 539*
33. *Same.—Motion to Quash.*—Where the record discloses enough to authorize the inference that the indictment was duly returned by a lawfully organized grand jury for the term at which it was presented, it is sufficient, in that respect, on a motion to quash. *Ib.*
34. *Same.—Murder by Arsenic.—Quantity of Poison.*—In an indictment charging murder by the administration of arsenic, the precise amount of the arsenic is immaterial, if the facts charged show that it was the poison which caused the death. *Ib.*
35. *Same.—Absence of Prisoner During Argument of Motion to Quash.*—It is not error to hear argument, on a motion to quash an indictment, in the absence of the prisoner. Section 1786, R. S. 1881, relates merely to the trial. *Ib.*
36. *Same.—Arraignment.—Practice.*—A motion to quash, as well as a demurrer to an indictment, in regular order, precedes the arraignment. *Ib.*

37. *Same.—Withdrawing Plea of Not Guilty.—Discretion of Court.*—In the absence of a showing of cause, the granting or withholding leave to withdraw a plea of not guilty rests in the discretion of the trial court. *Ib.*
38. *Same.—Juror.—Examination of as to Qualifications.*—Much rests in the discretion of the trial court as to what questions may or may not be answered by a person called as a juror, touching his qualifications to serve, but great latitude ought to be allowed. *Ib.*
39. *Same.—Murder.—Proof that Deceased was Human Being.*—In a prosecution for murder it is unnecessary, but harmless to the accused, to prove that the deceased was a human being. *Ib.*
40. *Same.—Accused's Statement as Witness at Coroner's Inquest.—Signature to.—Evidence.*—Where one, who is subsequently indicted for the murder of the deceased, voluntarily testifies as a witness at the coroner's inquest concerning the death of such deceased, it is his duty to attest his statement by his signature, and such statement, if it becomes relevant and material, may be read in evidence against him at his trial. *Ib.*
41. *Same.—Evidence.*—The mere facts that such witness, after his statement was reduced to writing, asked an attorney for the prosecution, who was present at the inquest, if signing such statement would clear or criminate him, to which such attorney answered that he did not know, and he then signed without further hesitation, do not make such statement inadmissible as evidence, nor is it a material inquiry whether the attorney's answer was true or untrue. *Ib.*
42. *Same.—Harmless Error.*—It is not available error to overrule questions propounded to a witness, which are merely collateral to the main question under investigation, and which can be either permitted or denied without material injury to any one. *Ib.*
43. *Same.—Physician.—Opinion.—Credibility.*—A physician who attended the deceased in his last sickness, and who, as a witness at the trial, gives it as his opinion that the case was one of arsenical poisoning, may properly be asked if he had treated it as such, as a means of testing his credibility, but the refusal to permit the question is not necessarily a material error. *Ib.*
44. *Same.—Medicine Administered by Physician.—Showing that it Contained no Poison.*—Where the physician administered bismuth to the deceased in his illness, and the question is made whether it might not have contained arsenic, he may testify that he afterward gave the same kind of bismuth to another patient without injury, and it may also be shown that a chemist, who analyzed bismuth from the same package, found no traces of arsenic in it. *Ib.*
45. *Same.—Medical Books.*—Medical books are not admissible as evidence. *Ib.*
46. *Same.—Expert.—Hypothetical Case.—Opinion Certain or Probable.*—Where a physician, testifying as an expert, expresses the opinion upon a hypothetical case, that the deceased came to his death by arsenical poison, he may properly be asked, in behalf of the accused, whether his conclusion is one of certainty or only of high probability, but the refusal of the court to permit the question may not be available error in the light of other expert testimony. *Ib.*
47. *Same.—Misconduct of Counsel in Argument.*—For misconduct of counsel for the State in argument, held not sufficient to justify the reversal of the judgment, when considered in connection with interruptive denials of counsel for the accused and the prompt disapproval of the court, see opinion. *Ib.*
48. *Same.—Instruction.—Death Within a Year and a Day.*—Where the evi-

- dence shows that the deceased died within a week after his symptoms of arsenical poisoning, it is unnecessary for the court, in stating the facts necessary to a conviction, to tell the jury that death must have resulted within a year and a day after the poison was administered. *Ib.*
49. *Same.*—An instruction which is good as a whole can not be attacked in part. *Ib.*
50. *Same.*—*Instruction as to Hypothetical Case.*—*Expert.*—An instruction, that the facts stated in a hypothetical case need not necessarily be always fully proven, to give value to the testimony of an expert, is substantially correct. *Ib.*
51. *Same.*—*Circumstantial Evidence.*—An instruction, given in connection with proper illustrations and precautions, that the accused's guilt might be established by circumstantial evidence alone, is good. *Ib.*
52. *Same.*—*Rejection of Evidence by Jury.*—An instruction, that testimony can only be rejected because it is not true, and that when the evidence is irreconcilably conflicting, that which is false must be rejected, is abstractly correct. *Ib.*
53. *Same.*—*Instruction Must be Applicable to Evidence.*—Where an instruction is asked which is not applicable to the evidence, it will be properly refused. *Ib.*
54. *Same.*—*Cumulative Instructions.*—It is not error to refuse instructions which are merely cumulative. *Ib.*
55. *Same.*—*Misconduct of Jury.*—*Practice.*—Where the trial court hears evidence upon a question of misconduct of the jury, its decision on that question will not be disturbed by the Supreme Court on what may seem to be the weight of the evidence. *Ib.*
56. *Same.*—*Technical Errors.*—Where the verdict is right upon the evidence, it will not be reversed for merely abstract and practically harmless errors. *Ib.*

COURTESY.

See HUSBAND AND WIFE.

CUSTOM.

A custom that a party shall not sue in a court of justice for money due him on a contract is not valid. *Bauer v. Samsen Lodge, K. of P., 262*

DAMAGES.

See CITY, 4 to 6; EVIDENCE, 4; FRAUD; LIBEL, 5; MASTER AND SERVANT; NEGLIGENCE; PRACTICE, 12; PRINCIPAL AND SURETY, 4; SPECIAL VERDICT, 3; TRESPASS, 2; VENDOR AND PURCHASER, 1.

1. *Bond.*—*Liquidated Damages, Complaint for.*—*Evidence.*—In a suit on a bond which provides, that in case of breach "the penalty therein written shall be taken and deemed as liquidated damages," it is not necessary to aver in the complaint, nor to prove on the trial, any amount of damages actually sustained, but on proof of the execution of the bond, and a breach of it, the plaintiff is entitled to recover the liquidated damages named in the bond. *Stanley v. Montgomery, 102*
2. *Same.*—In a complaint on a bond conditioned for the payment of liquidated damages in case of breach, averments, that by the condition of the bond the penalty was to become due as liquidated damages, that the condition of the bond has been broken, "whereby an action hath accrued to the plaintiff against the defendant to recover the said sum of \$1,500, for which he demands judgment," etc., are equivalent to an allegation that the penalty is due, or that the defendant is indebted in that amount. *Ib.*
3. *Measure of.*—*Personal Injury.*—*Case Followed.*—*City of Indianapolis v.*

Gaston, 58 Ind. 224, announces a correct rule for the measure of damages in a suit for personal injury. *Carthage T. P. Co. v. Andrews*, 138

4. *Excessive*.—Ten thousand dollars will not be held excessive damages by the Supreme Court for personal injury to a physician whose professional earnings were two thousand dollars per annum, and who suffered greatly, was rendered permanently unable to practice afterwards, and must sooner or later die from the injury. *Ib.*

DECEDENTS' ESTATES.

See CONTRACT, 7, 8; JURISDICTION, 3; PLEADING, 14; WILL.

1. *Sale of Real Estate*.—*Conclusiveness of Order of Sale*.—Where the petition of the administrator of a decedent avers that the land sought to be sold was owned in fee by the decedent, and the heirs are made parties to the proceeding, the order of the court concludes them from setting up title to the real estate ordered to be sold. *Lantz v. Maffett*, 23
 2. *Same*.—*Judgment*.—*Estoppel*.—*Cases Distinguished*.—Where the petition of an administrator of a deceased woman avers that she died the owner in fee of the real estate, and the heirs are made parties thereto, the judgment in favor of the administrator estops the heirs from setting up that the only interest the woman ever had in the land was a life-estate. Such a judgment can not be collaterally attacked. *Elliott v. Frakes*, 71 Ind. 416, and *Armstrong v. Cavitt*, 78 Ind. 482, distinguished. *Ib.*
 3. *Appeal*.—*Mandate*.—An application by an administratrix to sell real estate was resisted by a surviving partner of the intestate, upon the ground that the property belonged to the partnership, and its proceeds were necessary to pay debts of the firm, whereupon, by agreement, the sale was decreed and an order entered that so much of the purchase-money as was necessary to discharge the firm liabilities should be paid by the administratrix to the surviving partner. Upon refusal of the administratrix to so pay, the surviving partner instituted, in the same court, a proceeding in form for mandamus to compel payment. The proceedings were treated as in mandamus and ended in a final order compelling the payment.
- Held*, that, notwithstanding the novel form of the proceeding, its substance invoked only the probate jurisdiction of the court in the matter of the estate, and an appeal from the final order not taken within the time required by sections 2454-2457, R. S. 1881, should be dismissed. *Bennett v. Bennett*, 86
4. *Statement of Claim*.—*Pleading*.—*Practice*.—The "succinct statement" of a claim against a decedent's estate, as required by statute, must contain all the facts necessary to show *prima facie* that such estate is lawfully indebted to the claimant, or it is bad on demurrer. *Windell v. Hudson*, 591

DECLARATIONS.

See EVIDENCE, 3, 6, 9.

DEED.

See CONTRACT, 3; FRAUDULENT CONVEYANCE; HUSBAND AND WIFE; PARTY WALL; REAL ESTATE; SUBROGATION, 3, 4; TAXES, 1, 8, 9; VENDOR AND PURCHASER.

1. *Rule in Shelley's Case*.—*Conveyance to Class*.—*Construction of words "Present Heirs"*.—A deed, with an introductory clause reading thus: "This indenture witnesseth, that Isaiah Ferguson, in consideration of natural love and affection which he bears to his daughter Nancy West and her present heirs, and the sum of five dollars, the receipt whereof is hereby acknowledged, does give, grant and convey to the said Nancy West and her present heirs forever," and a *habendum* reading

as follows: "To have and to hold the same to the said Nancy West and her present heirs forever," does not, at common law, vest a fee in the grantee expressly named therein.

Fountain County C. & M. Co. v. Beckleheimer, 76

2. *Same.—Fee in Lands.—How Created at Common Law.*—At common law an estate in fee could only be created by the use of the term "heirs" in its technical sense, and when there were superadded words clearly showing that the word was not used in its technical sense, an estate in fee was not vested in the grantee, nor could a fee tail be created without the employment of the word "heirs" in its technical signification. *Ib.*
3. *Same.—Conveyance to Several.—What Estates Grantees Take.*—Where an estate is granted to several persons, and their respective interests are not specifically designated, they take jointly. *Ib.*
4. *Reformation of.—Judgment Creditors.—Equity.*—Judgment creditors are in no sense purchasers; their judgments are simply general liens upon whatever interest the judgment defendants may have in the land, and their rights do not stand in the way of the reformation of prior deeds and mortgages, nor of the enforcement of equities as between the grantor and grantee. *Boyd v. Anderson, 217*
5. *Same.—Mistake of Law and Fact.—Personal Defence.—Waiver.*—In a suit by a *bona fide* grantee against his grantor for the reformation of a deed, on the ground of mistake, the defence that the mistake is one of law and not of fact is personal to the grantor, and may be waived by him. Such defence can not be made by his judgment creditors. *Ib.*
6. *Burdens as Conditions of Grant Running with Land Conveyed.*—A deed from A. to B. for a tract of land contained the following: "Also, convey water to the amount of 600 inches, to be furnished from the head-race of the flouring-mill of said Voisinette (A.); said supply of water to be constant and perpetual. The said grantees (B.) hereby agreeing to assist in keeping up the dam in proportion to the amount of water used by them, and to construct and keep in order their own race." *Held*, that the stipulation in the deed, that B. should contribute to the keeping up of the dam, imposed a burden which was a condition of the grant of the water, and runs with the land; and a purchaser from B. of the land and water rights takes them subject to the burden. *Mason v. Lane, 364*
7. *Same.—Mortgage Subject to Burden.*—C., the purchaser from B., of the land and water rights conveyed to him by A., executed to D. a mortgage upon the same land and water rights, containing the same description and stipulation. *Held*, that the mortgage covered the land and water rights, but subject to the same burden. *Ib.*
8. *Same.—Rights under Mortgage not Affected by Subsequent Contract to which Holders are not Parties.*—Subsequent to the execution of the mortgage, C., the mortgagor, and L. & L., other grantees of A., entered into a contract which seems to have been entered into as an interpretation of the grant of water and of the burden imposed by the deed from A. to B. The holders of the mortgage were not parties to this contract. *Held*, that they are, therefore, not affected nor bound by it. *Ib.*
9. *Same.—Pleading.—Counter-Claim.—Estoppel.*—The mortgage was upon record at the time the contract was entered into. It had been assigned for value to S. and S. who owned the principal part of the stock of the corporation, C., and were the business managers of its affairs. While thus owning and holding the mortgage, they signed its name to the contract. Afterwards and for value they assigned the mortgage to

plaintiffs. In the counter-claim by L. & L. there is no averment that S. and S. did anything, said anything, concealed anything, or omitted anything, that did, or might in the least, influence or induce the other parties to enter into a contract with C. that they would not otherwise have entered into, nor is there an averment that the other contracting parties were ignorant of the fact that S. and S. owned the mortgage. *Held*, that the facts stated in the counter-claim are not sufficient to affect the rights of S. and S. and their assigns, under the mortgage, nor to estop them from asserting those rights. *Id.*

DEMAND.

See REPLEVIN.

DEMURRER TO EVIDENCE.

A demurrer to evidence admits all the facts which the evidence tends to prove, and all reasonable inferences therefrom; and the court can not in such case weigh the evidence, nor can it consider evidence favorable to the party demurring if there is a conflict.

Vigo Agricultural Society v. Brumfiel, 146

DESCRIPTION.

CONTRACT, 11; DEED, 4, 5; DRAINAGE, 2.

DEVISE.

See WILL.

DILIGENCE.

See CHANGE OF VENUE, 1.

DISCRETION.

See CHANGE OF VENUE, 2; CITY, 2; CRIMINAL LAW, 2, 18, 37, 38; SCHOOL COMMISSIONERS, 2.

DIVORCE.

See INSTRUCTIONS TO JURY, 2.

DOMESTIC RELATIONS.

See GUARDIAN AND WARD; HUSBAND AND WIFE; MASTER AND SERVANT.

DRAINAGE.

See CITY.

1. *Act of March 9th, 1875.—Lien of Certificate.—Pleading.—Complaint.*—In a suit to set aside and annul the lien of a certificate issued to a contractor, in a drainage proceeding commenced under the act of March 9th, 1875, and by the county treasurer placed on the tax duplicate for collection, on the ground that neither the plaintiff, nor the land upon which the lien was claimed, was mentioned in the viewers' report of benefits, a complaint, reciting such facts and showing that more than seven years have elapsed since the establishment of the ditch, but failing to allege that at the time of such establishment and report, the plaintiff was the owner of the land, and that the land was not intended to be assessed, is bad on demurrer. *Baker v. Clem, 109*
2. *Same.—Erroneous Description of Land.*—Under the act of 1875, above referred to, a misdescription in the viewers' report, or on the tax duplicates, of the land intended to be assessed, will not enable the owner to evade liability or defeat the lien thereon of the ditch certificate. *Id.*
3. *Act of April 21st, 1881.—Appeal.—Practice.*—In a proceeding for the establishment of a drain before the board of commissioners under the act of April 21st, 1881, an appeal from the judgment of the board, taken by either party to the circuit court, is governed by the provi-

sions of sections 17 and 18 of that act, and not by the general statute governing appeals from the decisions of boards of commissioners, and no notice of any such appeal need be given the adverse party, either by summons or otherwise. *Johnson v. Mullinix, 164*

4. *Notice.—Names of Owners.—Petition.*—Section 4274, R. S. 1881, requires that the names of owners of lands assessed for benefits arising from the construction of a ditch shall be stated in the petition if known, and a failure to name such owners renders the proceedings void. *Troyer v. Dyar, 396*
5. *Same.—Estoppel.—Pleading.*—No intendments are made in favor of a plea of estoppel, but it is incumbent upon the party pleading it to aver all the facts essential to its existence. *Ib.*
6. *Same.—Assessment.*—An answer of estoppel pleaded to an action to set aside a drainage assessment is not good unless it avers that the plaintiff had knowledge of the fact that his land was assessed. *Ib.*
7. *Report of Drainage Commissioners.—Statement of Estimated Cost of Ditch.*—Where the report of the commissioners of drainage states in positive terms that the estimated cost of the construction of the ditch will be less than the estimated benefits, it is sufficient, although in a tabulated statement attached to the report it is shown that the estimated benefits and the estimated expense are exactly equal. *Grimes v. Coe, 406*
8. *Same.—Party Notified can not Take Advantage of Failure to Give Notice to Others.*—A party who has due notice of the proceeding can not take advantage of the failure to notify some other land-owner, unless it appears that such failure will prevent the construction of the ditch. *Ib.*
9. *Same.—Township Property.*—A drainage assessment can not be defeated by a land-owner who has been duly notified, upon the ground that an assessment has also been levied upon township property. *Ib.*

DUPLICITY.

See CRIMINAL LAW, 3.

EJECTMENT.

See REAL ESTATE, ACTION TO RECOVER.

ELECTION.

See COUNTY COMMISSIONERS.

EMINENT DOMAIN.

See CITY, 3.

EQUITY.

See DEED, 4; PRACTICE, 7; TAXES, 1; TRUSTS, 2.

1. *Fraudulent Transfer of Property.—Creditor not Bound to Obtain Judgment Before Suing to Set Aside Transfer.*—A creditor is not bound to put his debt in judgment before suing to set aside a transfer of property made for the purpose of defrauding him. *Quarl v. Abbett, 233*
2. *Same.—Attachment.*—A creditor may maintain a suit to set aside a fraudulent transfer of the capital stock of a corporation although an attachment has been levied thereon. *Ib.*
3. *Same.—Lien of Writ.—Removal of Impediments to Lien.*—Where property is within the jurisdiction of the court, a suit may be maintained in conjunction with the attachment proceedings to remove impediments to the lien and to make it perfect. *Ib.*

ESCAPE.

See BASTARDY, 1.

ESTOPPEL.

See DECEDENTS' ESTATES, 1, 2; DEED, 9; DRAINAGE, 5, 6; HIGHWAY, 4; JUSTICE OF THE PEACE, 2, 3; MARRIED WOMAN, 7; PARTITION, 1; PLEADING, 12; PRINCIPAL AND AGENT; SCHOOLS, 10; SWAMP LANDS, 6; TRUSTS, 3; VENDOR AND PURCHASER, 2.

EVICTION.

See REAL ESTATE, ACTION TO RECOVER.

EVIDENCE.

See BASTARDY, 3; CRIMINAL LAW, 9, 10, 13, 19 to 23, 39 to 46, 50 to 53, 56; DAMAGES, 1; DEMURRER TO EVIDENCE; FRAUD, 4; HIGHWAY, 1; INSTRUCTIONS TO JURY, 1, 4, 6; MARRIED WOMAN, 4, 7; PLEADING, 11; PRACTICE, 3, 18, 24, 25; QUIETING TITLE; REAL ESTATE; SEDUCTION, 4; SUPREME COURT, 3, 5, 6, 8, 12, 14; SWAMP LANDS, 1, 3; TRESPASS, 1, 2; WITNESS.

1. *Husband and Wife.—Privileged Communications.*—A widow is not a competent witness to testify to communications made to her by her deceased husband during the marriage. *Stanley v. Montgomery, 102*
2. *Opinions.—Non-Expert Witness.*—A witness, not an expert, is competent to give an opinion as to the health and physical condition of another, based upon facts within his personal knowledge, which should first be stated. For reference to many authorities on the subject see opinion. *Carthage T. P. Co. v. Andrews, 138*
3. *Same.—Declarations as to Injuries.*—Statements and complaints made by a party injured as to his sufferings and symptoms at the time, whether made to his surgeon or to others, are competent evidence in his behalf in a suit to recover for his injuries. *Ib.*
4. *Same.—Damages.*—In a suit for personal injury, where the complaint avers that the plaintiff was a physician, and by reason of the injury is unable to follow his profession, it is competent to prove these facts, and also what his practice prior to the injury was worth; also the extent of his injury and its probable duration. *Ib.*
5. *Offer of Proof.*—An offer of proof should not be so general as to require the court, for the purpose of determining what facts are competent, to examine a mass of previous evidence, but should specifically state competent facts which it is expected to show. *Over v. Schiffing, 191*
6. *Same.—Statements of Stranger Binding on Party.*—One who has directed another to a third person, for information or direction, will be bound by the statements made by such third person. *Ib.*
7. *Same.—Intent.*—Where the intent with which one has done an act becomes material, it is proper to ask him as a witness what was the intent. *Ib.*
8. *Same.—Objection to Evidence.*—There can be no available error in admitting evidence over objection, where no ground of objection is specifically stated. *Ib.*
9. *Principal and Agent.—Declarations of Agent.*—Only declarations of an agent while actually engaged in transacting the business of the principal, to which the declarations relate, are admissible.

La Rose v. Logansport Nat'l Bank, 332

EXECUTION.

See SHERIFF; SHERIFF'S SALE.

EXECUTORS AND ADMINISTRATORS.

See DECEDENTS' ESTATES; JURISDICTION, 3; PLEADING, 14.

EXHIBITS.

See PLEADING, 10.

EXPERT.

See CRIMINAL LAW, 46, 50; EVIDENCE, 2.

FELONY.

See CRIMINAL LAW.

FENCE.

See RAILROAD; TRESPASS, 2.

FORECLOSURE.

See MORTGAGE; SHERIFF'S SALE, 1; SUBROGATION; TAXES, 3.

FORFEITURE.

See GRAVEL ROAD.

FORGERY.

See PROMISSORY NOTE, 4.

FORMER ADJUDICATION.

See DECEDENTS' ESTATES, 1, 2; HIGHWAY, 4; PARTITION, 1; RES ADJUDICATA; SUBROGATION, 3.

FRAUD.

See CONSTITUTIONAL LAW, 4; EQUITY; FRAUDULENT CONVEYANCE; JURISDICTION, 6 to 12; LIBEL, 1; MARRIED WOMAN, 6, 7; PROMISSORY NOTE, 1; STATUTE OF FRAUDS; TRUSTS, 3.

1. *Scienter.—Pleading.*—It is not necessary to aver in a complaint to recover for damages resulting from a fraudulent representation, that it was known to be untrue by the person by whom it was made.

Furnas v. Friday, 129

2. *Same.*—Where there is an honest purpose, and no intention or attempt to deceive, nor any reckless statement, there is no legal fraud, although the statement may not be true; and a complaint which merely shows that a statement was made which was not true is insufficient on demurrer.

Id.

3. *Pleading.—Injury.*—Fraud without injury creates no cause of action, and in pleading fraud facts must be pleaded—not merely epithets—and an injury must be shown.

Bodkin v. Merit, 293

4. *Contract.—Damages.—Evidence.*—For a consideration of evidence held sufficient to sustain a judgment for damages for fraudulent violation of contract, see opinion.

Rotach v. McCarty, 461

FRAUDULENT CONVEYANCE.

See EQUITY; JURISDICTION, 6 to 12.

1. *Subsequent Purchaser.*—A conveyance of land executed for the purpose of defrauding creditors is binding against a subsequent grantee of the same grantor, unless such subsequent grantee establish some additional ground of relief. That the conveyance to defraud creditors was a violation of a criminal statute can not of itself serve as such additional fact.

Anderson v. Etter, 115

2. *Same.—Voluntary Conveyance to Defraud Creditors.*—A conveyance of land will not, in this State, be held void in favor of one who subsequently purchases for value, in good faith and without notice, from the same grantor, solely upon the ground that the prior grantee was a volunteer;

but if such prior conveyance, besides being voluntary, was a part of a scheme to defraud creditors, of which the voluntary grantee had notice, his conveyance will be void as to such subsequent grantee. *Ib.*

GARNISHMENT.

See ATTACHMENT.

GRAVEL ROAD.

1. *Corporation.—Turnpike.—Consolidation.—Forfeiture.*—Where a duly organized turnpike company, acting under the advice of counsel, effects a consolidation, under one management, of its property and franchises with the property and franchises of an intersecting company, and the common management acts for more than twelve years without question by the State, when, by legal proceedings, the consolidation is declared void, and each company thereupon assumes control of its own property and exercises its own franchises, and so continues to act for more than one year without objection, there is no forfeiture of its rights by such company.

State, ex rel., v. Crawfordsville, etc., T. P. Co., 283, 600

2. *Corporation.—Turnpike.—Extensions.—Void Consolidation.—Effect as to Rights of Company.*—Where two turnpike companies, under an attempted consolidation, are controlled by a common management for many years, without objection, and then, by legal proceedings, such consolidation is declared void, each company may assume control of its original road and franchises, and also of an extension of such original road, for the construction of which articles of association and subscriptions to capital stock were made by the individual company, although the right of way for such extension was petitioned for by, and granted to, the consolidated company.

Crawfordsville, etc., T. P. Co. v. State, ex rel., 435

GUARANTY.

See PRINCIPAL AND SURETY.

GUARDIAN AND WARD.

See SUPREME COURT, 2.

1. *Defective Bond.—Omission of Penalty.*—A guardian's bond is valid and enforceable although no penalty is named therein.
State, ex rel., v. Britton, 214
2. *Same.—Failure to Approve Bond.*—The bond of a guardian is not invalidated by a failure to approve it. *Ib.*
3. *Same.—Mistake.—Pleading.*—A complaint which shows a mere mistake of law is not good; in order to be good it must contain allegations showing a mistake of fact. *Ib.*

HABEAS CORPUS.

1. *Return.*—To a writ of *habeas corpus*, a return, setting up a judgment of the circuit court, is good. *Lucas v. Hawkins, 64*
2. *Practice.—Judgment.*—In a *habeas corpus* proceeding a formal judgment is not required to be entered. *Ex Parte Richards, 260*
3. *Same.—Appeal.*—Where, in a *habeas corpus* proceeding, the record shows a decision of the court below refusing to admit the petitioner to bail, the petitioner may appeal from such decision to this court, notwithstanding the fact that no formal judgment has been rendered in the proceeding. *Ib.*
4. *Same.—Burden of Proof.*—In a *habeas corpus* proceeding the burden of proving the allegations in the petition is on the petitioner. *Ib.*

HARMLESS ERROR.

See CRIMINAL LAW, 15, 42, 56; PRACTICE, 1, 2, 6, 14, 21; PROMISSORY NOTE, 3; SUPREME COURT, 1.

HEIRS.

See CONTRACT, 7, 8; DECEDENTS' ESTATES; DEED, 1, 2; HUSBAND AND WIFE; WILL.

HIGHWAY.

See GRAVEL ROAD.

1. *Change of.*—*Width Must be Given or Order Void.*—*Evidence.*—Where it does not appear in a transcript of proceedings instituted under 1 R. S. 1852, p. 313, *et seq.*, to have a highway changed and relocated, how wide the highway vacated and the one established are, an order locating the highway is void, and the transcript is not competent evidence to show upon what line it was established, nor to overthrow a highway established by twenty years' user. *Strong v. Makeever*, 578
 2. *Same.*—*Highway by Twenty Years' User.*—*Statute Construed.*—Under section 5035, R. S. 1881, it is the twenty years' use of a road that makes it a public highway regardless of its origin, and it is immaterial whether the use is with the consent or over the objections of the adjoining land owners. Statements in *Board, etc., v. Huff*, 91 Ind. 333, in conflict with this holding, are disapproved. *Ib.*
 3. *Same.*—*Power of County Commissioners.*—Such section of the statute does not provide for the changing of highways, nor for the correction of mistakes in locating them, but is limited to roads used as highways; and before the board of commissioners can make any order for entering of record, it must be shown that the road is used as a highway, and, when resistance is made, such board can not go beyond the way as used for twenty years, and establish it upon a different line. *Ib.*
 4. *Same.*—*Former Adjudication.*—*Estoppel.*—A township superintendent of roads filed before the board of commissioners a petition asking that they ascertain and enter of record a certain portion of a highway, which, it was averred, had been in use more than twenty years. A remonstrance was filed, alleging that the road had not been so used, and that it was not upon the correct line. An order was made that the board "finds for the remonstrants and refuses the prayer of the petition," and afterwards a motion for a new trial was refused.
- Held*, that these orders, if in any sense a judgment, will not prevent the county board from afterwards ascertaining and making a record of the highway as established by twenty years' user, nor estop the successor of the road superintendent from objecting to a subsequent application for a change of the road as used to a different line. *Ib.*

HUSBAND AND WIFE.

See EVIDENCE, 1; MARRIED WOMAN; MORTGAGE, 3; PARTIES; SHERIFF'S SALE, 1; TAXES, 4; TRESPASS, 3, 4; WILL; WITNESS, 2.

Wife's Deed.—*Tenant by the Curtesy.*—*Statute of Limitations.*—In 1847 land was conveyed to a married woman by a deed giving her an estate of inheritance, without any express and clear restriction of the rights of her husband, and she and her husband took possession. In 1850 she alone executed a voluntary deed, recorded in 1866, purporting to convey the land to her said husband, and he remained in possession, claiming ownership, till she died, intestate, in 1869, leaving surviving her said husband and a number of children, his issue by her. Said husband continued in possession of the land until, in 1873, he sold and by warranty deed conveyed it for value to a stranger, who thereupon

took possession and paid the purchase-money to said husband and father, who died in 1875, leaving said children surviving.

Held, that said deed of the wife to the husband conveyed no interest, but was void.

Held, also, that the husband was a tenant by the curtesy, and the right of action of said children for partition and the recovery of their interests in the land as the heirs of their mother did not accrue, and the statute did not begin to run against them, until the death of their father.

Lunts v. Greve, 173

INDICTMENT.

See CRIMINAL LAW, 3, 4, 8, 32 to 36.

INFANT.

See GUARDIAN AND WARD.

INFORMATION.

See COUNTY COMMISSIONERS, 3.

INJUNCTION.

See JUDGMENT, 1; TAXES, 1.

INSANITY.

See CRIMINAL LAW, 23, 24.

INSTRUCTIONS TO JURY.

See CRIMINAL LAW, 5, 11, 12, 24 to 26, 48 to 55; PRACTICE, 5.

1. *Credibility of Witness.—Province of Jury.*—An instruction "that the jury must determine the credibility of the witnesses," and that certain matters (enumerating them) "are proper matters for the jury to consider in coming to a conclusion as to whom they will believe and whom they will not believe," does not invade the province of the jury, and is not erroneous.
Stanley v. Montgomery, 102
2. *Same.—Imposing upon Jury Inference Drawn by Court.*—In a suit on a bond given in compromise of a bastardy proceeding, conditioned among other things, "that the said S. should not by his misconduct give the plaintiff legal cause for divorce," an instruction to the jury: "If you find that he (the defendant), after their said marriage, sought the society of prostitutes, and women of bad repute for chastity, or that he went into a private bed-room with a woman of bad repute for chastity, or a prostitute, in the night time, and remained there for some time, no one else being present, then, and in either event, your verdict should be for the plaintiff," is erroneous, because it imposes upon the jury an inference made by the court. *Ib.*
3. *Court not Required to Modify Erroneous Instruction Asked.*—Unless an instruction asked is correct in terms as prayed, the court is not bound to modify it, but may refuse it.
Over v. Schiffing, 191
4. In the absence of the evidence, instructions refused will be deemed properly refused because not applicable to the case made; nor will instructions given work a reversal of the judgment unless erroneous under any possible state of facts.
Stout v. Turner, 418
5. *Same.—Compromise of Crime.*—A complaint to cancel a note alleged to have been executed at the demand of and taken and received by the defendant "in full satisfaction and compromise of the crime of larceny, robbery and embezzlement," with which said defendant charged the maker, etc., tenders an issue to which is applicable an instruction that if the defendant took the note under an agreement, express or implied, that he would not prosecute the maker for such

crime, and without any other consideration, the jury should find for the plaintiff. *Ib.*

6. *Weighing Evidence*.—In the absence of a request for fuller instruction, it is not error for the trial court to say to the jury that they are familiar with the manner of weighing evidence, and that further instruction is not necessary. *Rotach v. McCarty, 461*
7. That a single instruction, standing alone, is subject to criticism, is not ground for reversal, if, upon the charge as a whole, the law is correctly stated to the jury. *Hodges v. Bales, 494*

INSURANCE.

See NEGLIGENCE.

1. *Mutual Benefit Societies.—Duty of Members to Take Notice of By-Laws*.—A person who becomes a member of a secret mutual benefit society is bound to take notice of its by-laws. *Bauer v. Samson Lodge, K. of P., 262*
2. *Same.—Power of Mutual Benefit Societies to Limit Right to Sue*.—Mutual benefit societies may prescribe regulations as to procedure in enforcing claims, and may require appeals to superior bodies before instituting suit, but they can not entirely take away the right to invoke the aid of the courts in enforcing claims existing in favor of its members upon contracts. *Ib.*
3. *Same.—Mutual Benefit Societies are Insurance Companies*.—A mutual benefit society which, for an agreed compensation, agrees to pay benefits to its members, is not a purely benevolent society, but is, in respect to the contract to pay benefits, an insurance company. *Ib.*
4. *Same.—What By-Laws Will Limit Right to Sue*.—By-laws simply giving the right of appeal to a superior body, to which the mutual benefit society belongs, will not deprive a member of the right to sue; in order to have this effect the by-laws must positively require members to prosecute an appeal before resorting to the courts for redress. *Ib.*
5. *Same.—Claims for Money.—Question of Policy and Doctrine*.—A member of a secret order which exercises the privileges and powers of a mutual benefit society, who sues for a benefit due him under a contract, occupies an essentially different position from one who presents a question of policy, doctrine, or discipline, and courts will entertain jurisdiction in the one case, but, as a general rule, not in the other. *Ib.*

INTENT.

See EVIDENCE, 7.

INTEREST.

See TAXES, 6, 8.

JUDGE. •

See JUDGMENT, 1; RECEIVER, 1 to 3.

JUDGMENT.

See ATTACHMENT, 3, 4; BASTARDY; DECEDENTS' ESTATES, 1 to 3; DEED, 4; EQUITY, 1; HABEAS CORPUS, 1 to 3; HIGHWAY, 4; JURISDICTION, 1, 2, 4 to 6; PARTITION; PLEADING, 1, 2, 9, 12; QUIETING TITLE; RECEIVER, 5; SHERIFF; SPECIAL VERDICT, 3; SUBROGATION, 1, 3; TRUSTS.

1. *Judge Pro Tempore*.—*Appointment of*.—*Record*.—*Collateral Attack*.—Where the record on appeal shows the appointment of a judge pro tempore of the circuit court to have been regularly made, that he qualified, caused his appointment and oath to be properly entered on the order-book, and presided under such appointment during a term of

such court, a party against whom judgment has been rendered during such term will not be heard, in a subsequent proceeding to set aside such judgment, to impeach and contradict the record by the allegation of facts and circumstances *dehors* the record, tending to show that the appointment had not been so made; and a complaint to enjoin the collection of such judgment, which admits that according to the record the appointment was properly made, but avers facts contradictory of the record and denying the appointment, is bad on demurrer.

Rogers v. Beauchamp, 33

2. *Notice by Publication.—Defective Notice.*—Where there is some notice, although defective, the judgment is not void, even where the notice is by publication. *Quarl v. Abbott, 233*
3. *Receiver.—Collateral Attack.*—A judgment appointing a receiver can not be attacked collaterally. *Bodkin v. Merit, 295*
4. *Collateral Attack.—Presumption.—Pleading.*—Where a judgment is attacked collaterally by any pleading, all reasonable presumptions will be indulged in favor of its validity, and the facts alleged must be such as will overcome them. *Exchange Bank v. Ault, 322*
5. *Same.—Notice of Pendency of Action.*—Where a party seeks, by complaint or cross complaint, to impeach the judgment of a court of superior jurisdiction, on the ground that he had no legal notice of the pendency of the action in which it was rendered, he must allege what, if anything, is shown by the record in relation to the issue and service of process on him. *Ib.*
6. *Same.—Jurisdiction.*—Where a court has jurisdiction of the subject-matter, it will be presumed, in the absence of any showing to the contrary, that it acquired jurisdiction of the person before rendering judgment. *Ib.*
7. *Same.—Collateral Attack by Party to Record.*—Where a party to a judgment seeks to impeach its validity and have it declared void, in a subsequent action, by the allegation of facts *dehors* the record and not apparent on the face of the judgment, such an attack is a collateral one, and can not be made by a party to the record. *Ib.*

JUDICIAL SALE.

See MORTGAGE, 3; SHERIFF'S SALE; SUBROGATION.

JURISDICTION.

See ATTACHMENT; DECEDENTS' ESTATES; EQUITY, 3; INSURANCE, 5; JUDGMENT, 1, 2, 5, 6; JUSTICE OF THE PEACE, 2, 3; PLEADING, 2; RECEIVER; SUPERIOR COURT, 1.

1. *Judgment.—Collateral Attack.*—Authority to hear and decide a legal controversy is jurisdiction, and where there is such authority the judgment can not be collaterally attacked although it may be erroneous. *Lantz v. Maffett, 23*
2. *Same.—When Judgment Can Not be Collaterally Impeached.*—Where it appears on the face of the record that the court had jurisdiction, the judgment can not be impeached collaterally. *Ib.*
3. *Same.—Decedents' Estates.—Court of Common Pleas.*—The court of common pleas had jurisdiction to try and determine the question of title to land sought to be sold by an administrator to pay debts due from the estate of his intestate. *Ib.*
4. *Constructive Notice.—Personal Judgment.*—A personal judgment is one which binds the judgment defendant personally and creates a lien upon his property generally; such a judgment can not be rendered where the notice of the action is by publication. *Quarl v. Abbott, 233*

5. *Same.—Presumption of Notice.*—Where a judgment is collaterally attacked and the record is silent as to notice, the presumption is that notice was given, and this rule applies to cases of constructive as well as to cases of actual notice. *Ib.*
6. *Same.—Fraudulent Transfer of Property.—Shares of Stock in Corporation.*—A judgment setting aside a fraudulent transfer of shares in the capital stock of a corporation may be rendered upon a notice by publication. *Ib.*
7. *Same.—Non-Residents.*—The process of a court of this State may operate upon personal property within the territorial limits of the State, although the owner is a resident of another State, and can only be given constructive notice. *Ib.*
8. *Same.—Capital Stock of Corporation.*—Shares of capital stock in a private corporation are property, and may be reached by attachment. *Ib.*
9. *Same.—Attachment.*—The issuing of a writ of attachment, and the levying thereof on shares of the capital stock of a corporation transferred for the purpose of defrauding creditors, brings the property within the jurisdiction of the court out of which the writ issued. *Ib.*
10. *Same.—Authority to Try Questions of Fact upon Constructive Notice.—Fraud.*—Although fraud is a question of fact, still, it may be tried, where the property sought to be reached is within the jurisdiction of the court, upon constructive notice given to a non-resident defendant. *Ib.*
11. *Same.—What is Jurisdiction.*—The authority to hear and determine a cause is jurisdiction to try and determine all the questions involved in the controversy. *Ib.*
12. *Same.—Attachment.*—The authority to determine whether property seized under a writ of attachment is subject to the writ includes the authority to ascertain and find the amount due the attaching creditor. *Ib.*

JUROR.

See CRIMINAL LAW, 17, 18, 38; NEW TRIAL.

JURY.

See CRIMINAL LAW, 1, 2, 4, 5, 11, 12, 17, 18, 38, 48 to 55; INSTRUCTIONS TO JURY; PRACTICE, 7, 22; SPECIAL VERDICT.

JUSTICE OF THE PEACE.

See CRIMINAL LAW, 15, 16; PLEADING, 12.

1. *Replevin Bond.—Consanguinity.*—It is no defence to an action against a surety upon a replevin bond, given in proceedings before a justice of the peace, that such justice was related, within the sixth degree of consanguinity, to all the parties to the action.
Harbaugh v. Albertson, 69
2. *Jurisdiction.—Estoppel.*—Where a party voluntarily submits the jurisdiction of his person to a justice of the peace who has jurisdiction of the subject-matter of the suit, he will not be permitted afterwards to controvert the justice's jurisdiction of his person. *Ib.*
3. *Same.—Surety.*—Where, in replevin proceedings before a justice of the peace, a surety on the replevin bond by his execution thereof has enabled the plaintiffs to obtain possession of the property in controversy, he will be estopped from setting up as a defence to an action on the bond, that the justice before whom the action was commenced, had no jurisdiction over the persons of the parties. *Ib.*

LANDLORD AND TENANT.

See SHERIFF'S SALE, 1.

1. *Set-Off.—Tort.*—The general rule is that a tort can not constitute a de-

fence by way of set-off or counter-claim, and a mere trespass by the landlord can not be set off against an action to recover rent.

Avery v. Dougherty, 443

2. *Lease.—Covenant for Quiet Enjoyment.*—Where there is a demise of land for a term certain, the law imports into the lease a covenant for quiet enjoyment. *Ib.*
3. *Same.—Breach of Covenant.—What Constitutes.*—A mere fugitive trespass by the landlord will not constitute a breach of the covenant for quiet enjoyment, but an entry by the landlord, under a claim or assertion of title, will constitute a breach of the covenant. *Ib.*
4. *Lease.—License.*—An instrument conveying an estate in land, subordinate to that of the grantor, to a grantee, upon a valid consideration, and for a definite term, is a lease, and not a license, as a license grants no estate in land. *New York, etc., R. W. Co. v. Randall, 453*
5. *Same.—Effect of Holding Over.*—Where a tenant holds over after his lease has expired, the inference that the parties consent to a continuation of the same terms is so strong that it is adopted as a rule of law. *Ib.*
6. *Same.—Collateral Stipulations.*—In such case, where the lease contains collateral stipulations which can be performed after the expiration of the first term, they are made continuous by the implied consent of the parties. *Ib.*

LARCENY.

See CRIMINAL LAW, 8.

LEASE.

See CONTRACT, 11, 12; LANDLORD AND TENANT.

LEGISLATURE.

See SCHOOLS, 2 to 4; SHERIFF'S SALE, 5.

LIBEL.

1. *Communication to Employer.*—A letter, written voluntarily, and for the sole benefit of the writer, to another's employer, using language such as must have been understood by the employer as charging the employee with having obtained goods from the writer by fraudulent means, was held to be libellous, and not a privileged communication. *Over v. Schiffling, 191*
2. *Construction of Writing.—Justification.*—Whether a written instrument is or is not libellous, and what will constitute justification for a libellous publication, are questions for the court, and not for the jury. *Ib.*
3. *Same.—Plea of Justification.*—A plea of justification in an action for libel must proceed on the theory that all the material averments of the complaint are admitted. *Ib.*
4. *Definition.*—Any written or printed publication which holds a person up to scorn or ridicule, or to a stronger feeling of contempt or execration, or which imputes or implies his commission of a crime not directly charged, is libellous. *Crocker v. Hadley, 416*
5. *Same.—Excessive Damages.—Practice.*—Where the amount of damages has been determined by a jury and approved by the trial court, it must appear at first blush to be grossly excessive to secure a reversal of the judgment. *Ib.*

LICENSE.

See LANDLORD AND TENANT, 4.

LIEN.

See DRAINAGE; EQUITY, 3; MARRIED WOMAN, 3; MECHANIC'S LIEN; MORTGAGE; PARTNERSHIP, 1; QUIETING TITLE; TAXES; TRUSTS.

LIFE INSURANCE.

See INSURANCE.

LIS PENDENS.

See MORTGAGE, 1.

MANDATE.

See DECEDENTS' ESTATES, 3; SUBROGATION, 3.

MANSLAUGHTER.

See CRIMINAL LAW, 7.

MARRIED WOMAN.

See HUSBAND AND WIFE; MORTGAGE, 3; PARTIES; TAXES, 4.

1. *Suretyship*.—A contract executed by a married woman is one of suretyship to the extent that the consideration was received by her husband or any other person, or that it went to pay a debt or liability for which neither she nor her property was bound. *Vogel v. Leichner, 55*
2. *Same*.—Whether a married woman is principal or surety will be determined, not from the form of the contract, nor from the basis upon which the transaction was had, but from the inquiry, was she to receive, in person or in benefit to her estate, the consideration upon which the contract rests? *Ib.*
3. *Same*.—A valid lien existed upon the real estate of V., a married woman. After the act of April 16th, 1881, went into force, she joined with her husband in the execution of bonds, and a mortgage on such real estate to secure the loan of a sum in excess of the amount of the lien. With the money thus borrowed the lien was discharged, and the surplus remaining was converted by the husband to his own use. On the face of the papers both husband and wife appeared to be principals, and the lenders dealt with them on that basis; yet, as between the husband and wife, it was understood that the latter was surety. *Held*, that to the extent that the consideration of the loan was to be applied to the discharge of the existing lien on V.'s real estate, her contract was that of a principal; but as to the amount used by her husband which did not enure to her benefit, her contract was one of suretyship, and void. *Ib.*
4. *Same*.—*Burden of Proof*.—In an action against a married woman upon her contract, the burden of proof is upon the plaintiff to show for what purpose she contracted, and that she either did, or was to, receive the benefit of it, either in person or estate. *Ib.*
5. *Surety for Husband*.—*Compromise of Threatened Litigation*.—*Promissory Note*.—*Mortgage*.—Under section 5119, R. S. 1881, a note and mortgage executed by a married woman, upon her separate land to secure her husband's debt, are void; and the mere facts, without more, that the mortgagee believed he could subject said land to the payment of such debt, as having been conveyed to the wife to defraud the husband's creditors, and was threatening to bring suit for such purpose, and that, for the purpose of avoiding such threatened litigation, the note and mortgage were executed, is not sufficient to bind her as principal. *Warey v. Ford, 205*
6. *Same*.—*Suit to Cancel Note and Mortgage*.—*Pleading*.—*Fraud*.—In a suit by a married woman to cancel a note and mortgage executed by her to secure her husband's debt, a paragraph of answer by the mortgagee confessing the plaintiff's title to the land mortgaged, setting up noth-

ing in avoidance, and seeking argumentatively to deny the complaint, by stating that the plaintiff has no title in the land because of fraud, is bad on demurrer. *Ib.*

7. *Same.—Estoppel.—Evidence.*—One who takes a mortgage from a married woman to secure her husband's debt, with knowledge that her title is fraudulent as against creditors of the husband, is estopped, in a suit by her to cancel the mortgage, from proving the fraud for any purpose. *Ib.*

MASTER AND SERVANT.

See PRINCIPAL AND SURETY, 8.

1. *Fellow Servants.*—A master is not answerable to a servant for his injury caused by the negligence of a fellow servant engaged in the same line of employment. *Indianapolis, etc., R. W. Co. v. Johnson, 353*
2. *Same.—Negligence in Employing or Retaining Servants.*—A master who negligently employs, or wrongfully retains in his employment, incompetent servants, is responsible to a servant injured by the negligence of such incompetent fellow servants. *Ib.*
3. *Same.—Pleading.—General Averment Controlled by Specific Statements.*—In construing a complaint against a railroad company for injury received by the plaintiff while in the employment of the defendant and engaged in coupling cars, a general introductory statement, that the cars were unfit for the transportation of rails, was held to be controlled by specific statements of facts showing that the injury was caused by the manner in which the cars were loaded with rails. *Ib.*
4. *Same.—Negligence of Servants of Corporation.*—Where a complaint against a railroad company for injury to the plaintiff while engaged as the servant of the defendant in coupling cars, showed that the injury was the result of negligence in the loading of the cars, and it was alleged that the defendant suffered, permitted and directed the cars to be loaded in an improper manner described;
Held, that the complaint showed that the injury was caused by the plaintiff's fellow servants. *Ib.*
5. *Scope of Authority.—Liability of Master for Injury to Another.*—Where a servant is engaged in accomplishing an end which is within the scope of his employment, and while so engaged adopts means reasonably intended and directed to the end, which result in injury to another, the master is answerable for the consequences, regardless of the motives which induced the adoption of the means; and this, too, even though the means employed are outside of his authority, and against the express orders of the master. *Pittsburgh, etc., R. W. Co. v. Kirk, 399*
6. *Same.—Negligence.*—Where C., a section foreman, returning with his crew and hand-car from work, encounters obstructions on the line of his employer's road, and thereupon directs the car to be transferred to the track of a parallel line operated by another company, as occasionally had been done before, but without the knowledge or consent of either company, and while proceeding on such track his car is negligently propelled against the car containing the section men of such road, whereby one of the latter is injured, C.'s employer is liable. *Ib.*

MEASURE OF DAMAGES.

See DAMAGES; EVIDENCE, 4; NEGLIGENCE.

MECHANIC'S LIEN.

School-House.—Public Policy.—A mechanic's lien for work done, or for materials furnished, in the erection of a public school-house, can not be acquired or enforced. *Shattell v. Woodward, 17 Ind. 225, overruled.*

Falout v. Board of School Comm'rs, etc., 223

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MERGER.

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MORTGAGE.

See DEED, 4, 6 to 9; MARRIED WOMAN, 3 to 7; PARTNERSHIP; PLEADING, 9; PLEDGE; SHERIFF'S SALE, 1; SUBROGATION.

1. *Foreclosure.—Sheriff's Sale.—Redemption.—Lis Pendens.*—G. sued to foreclose a senior mortgage, making the junior mortgagee a party, and pending the suit he became assignee of the later mortgage. Without amendment of the complaint the case resulted in a foreclosure of the senior mortgage, a sheriff's sale to L., and at the proper time a deed by the sheriff to L.

Held, that after the lapse of a year from the sheriff's sale G. had no right to maintain a suit to redeem therefrom or to foreclose the junior mortgage. *Gordon v. Lee*, 125

2. *Cancellation.—Taking New Mortgage Will not Discharge Lien of First.*—The taking of a new note and mortgage by a mortgagee from a mortgagor, for the same debt, upon the same land, will not discharge the lien of the first mortgage, but such lien will be continued in the new mortgage, even if the first be cancelled. *Pouder v. Ritzinger*, 571

3. *Same.—Married Woman.—Judicial Sale.—Act of March 11th, 1875.—Foreclosure.*—Where a mortgage was executed by a husband alone prior to August 24th, 1875, the date of the taking effect of the act of March 11th, 1875, in relation to the rights of a married woman upon a judicial sale of her husband's lands, and after the taking effect of such act said mortgage is cancelled and a new one for the same debt executed by such husband upon the same land, the mortgagee's rights upon foreclosure remain as they were prior to such act. *Id.*

MUNICIPAL CORPORATION.

See CITY; SCHOOLS; SCHOOL COMMISSIONERS.

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NEGLIGENCE.

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1. *Railroad.—Fire Caused by Locomotive.—Measure of Damages.*—Where, by the actionable negligence of a railroad company, fire from its locomotive is communicated to adjoining property, which is thereby consumed, the owner of such property can recover his entire loss from such company without regard to any insurance thereon.

Cunningham v. Evansville, etc., R. R. Co., 478

2. *Same.—Insurance Indemnity no Defence by Railroad Company.*—In such case, the fact that such property at the time of its destruction was insured, and that the insurance companies had paid the owner the amount of the insurance, is not available to the railroad company as a defence. *Id.*

NEWLY DISCOVERED EVIDENCE.

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NEW TRIAL.

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Competency of Juror.—Relationship to Party.—The fact that a juror's first wife, who had been dead twenty years or more, was a second cousin of a party to the action, which fact the juror did not know when he agreed to the verdict, is not a sufficient cause for a new trial.

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Real Party in Interest.—Husband and Wife.—The owner of the property injured by the negligence of another is the real party in interest and the proper plaintiff; this is so although the owner is a married woman and her husband is the general manager of the property.

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PARTITION.

See HUSBAND AND WIFE.

1. *Title.*—Ordinarily, in a suit for partition, the title to the land is not in issue; but title may be put in issue in such a suit by appropriate pleadings, and when thus put in issue the decree is conclusive on that question.
Lunt v. Greve, 173
2. *Same.—Pleading.*—Under the statute, where the complaint in a suit for partition by proper averments tenders an issue as to the title to the land, an answer of general denial admits all defences; but when the complaint does not tender such issue, the general denial does not have such effect, and, in such case, in order that the question of title may be involved, it must be presented by an affirmative pleading on the part of the defendant.
Id.

PARTNERSHIP.

See ATTACHMENT, 4; DECEDENTS' ESTATES, 3; RECEIVER, 4.

1. *Chattel Mortgage Executed for Individual Debt of Partner*.—A partner has an interest only in the property of the partnership remaining after the payment of the partnership debts, and a chattel mortgage executed by one partner, for his individual debt, upon specific articles of property belonging to the partnership, conveys no lien as against the claims of creditors of the partnership. *Deeter v. Sellers, 458*
2. *Same*.—A chattel mortgage, executed by one partner upon partnership property for his individual debt, can not operate to deprive the other partner of the right to hold the property for the payment of a sum due him for money advanced to the partnership. *Ib.*

PARTY WALL.

Covenant Running with Land.—Case Distinguished.—A. and B. being owners of adjoining city lots, the former in erecting a building on his lot placed one-half the width of a side wall thereof on B.'s lot, pursuant to a written agreement of said parties, whereby, in consideration that A. should erect such a wall, B. bound himself, his heirs, executors, administrators and assigns, that whenever B., his heirs, executors, administrators or assigns, in any building he or they might erect on said lot so owned by B., should use said wall, or any part thereof, or attach any part of his or their building thereto, A. should be paid the full value of one-half of the original cost of said wall, and that B., his heirs, executors, administrators or assigns, should not use or attach to said wall until said value and cost should be ascertained and paid or tendered to A. After the erection of said building A. conveyed his said lot, with the improvements thereon, to C., reserving the right to receive compensation from adjoining property owners for the building or use of existing party walls. Afterwards D. became the owner of B.'s said lot, having purchased it with notice of said agreement, and erected a building thereon, and attached it to and used said wall.

Held, that B.'s covenant to pay ran with his said land, while the right to receive payment was personal to A.

Held, also, in an action brought on said contract by A. against D., that the latter was liable to the former for one-half of the original cost of the party wall, though, by reason of injury from fire, it was worth less than its original cost. *Block v. Isham, 28 Ind. 37, distinguished.*

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PROMISSORY NOTE, 1 to 3; RAILROAD, 1; SEDUCTION, 1 to 3; SPECIAL VERDICT, 2; TAXES, 1, 9; TELEGRAPH COMPANY; TRESPASS, 2, 3.

1. *Complaint.—Answer.—Demurrer.—Intervening Errors.*—Where the complaint does not state a cause of action, it is immaterial whether a paragraph of answer is good or bad on demurrer, for a bad answer is good enough for a bad complaint. In such case, where the plaintiff appeals, intervening errors are harmless and afford no ground for reversing the judgment. *Ice v. Ball, 42*
2. *Judgment.—Jurisdiction.*—In pleading the judgment of a court of general jurisdiction, it is unnecessary to aver the facts showing that the court had jurisdiction. *Lucas v. Hawkins, 64*
3. *General Scope.*—A pleading must be judged by its general scope and tenor, and not by fragmentary statements therein. *Over v. Schiffing, 191*
4. *Matters in Abatement and in Bar.*—At common law and under the present code matters in abatement must be pleaded prior to pleading matters in bar. *Field v. Malone, 251*
5. *Demurrer.—Plea in Abatement.*—A demurrer is not a plea in abatement, and matters in abatement may be pleaded after a ruling on demurrer to the complaint, unless the matter in abatement is as to the jurisdiction of the person of the defendant. *Bauer v. Samson Lodge, K. of P., 262*
6. *Sham Answer.—Practice.*—Where an answer does not appear upon its face to be a sham, the question as to whether or not it is such should be raised in the manner provided by section 382, R. S. 1881. *Moyer v. Brand, 301*
7. *Theory of Case.—Practice.*—A plaintiff must recover upon the theory of the case on which his complaint proceeds or not at all. *Holderman v. Miller, 356*
8. A pleading must proceed on a definite theory, and a complaint can not be good both as a complaint for a breach of contract and as a complaint to recover for injuries occasioned by a negligent breach of duty. *Leeds v. City of Richmond, 372*
9. *Complaint to Satisfy Mortgage and Judgment.—Tender.—Supreme Court.*—A complaint to secure the satisfaction of a mortgage and a judgment, alleging a tender and payment into court of "the full amount due on the judgment and the mortgage," but not stating the rate of interest on the judgment, or any other fact showing that the amount tendered was not sufficient, is good upon objection for the first time in the Supreme Court. *Soice v. Huff, 423*
10. *Exhibits.*—Where a written instrument is the foundation of a pleading and is made an exhibit, its statements will control the allegations of the pleading. *Avery v. Dougherty, 443*
11. *Evidence.*—There is a distinction between inferences in matters of pleading and evidence; in pleading, facts must be positively alleged and nothing except matters of law left to inference, while in considering evidence inferences of fact may be made by the triers of the case. *Ib.*
12. *Complaint before Justice of Peace.—Res Adjudicata.*—The complaint in an action commenced before a justice of the peace is sufficient if it will inform the defendant of the nature of the cause of action, and if a judgment thereon may be used as a bar to another action for the same cause. *Western U. Tel. Co. v. Huff, 535*
13. *Same.—Joins Interest.—Parties.*—Where it appears from the complaint that the plaintiffs are jointly interested in the cause of action stated, they are properly joined as co-plaintiffs. *Ib.*
14. *Complaint on Account.—Decedents' Estates.*—A complaint by an executor

upon an itemized account, alleging that the defendant is indebted to the plaintiff in a certain sum of money for the rent, use and occupation of certain land belonging to his decedent, is good on demurrer for the want of facts. *Ketcham v. Barbour*, 576

PLEDGE.

Right of Pledgee to Possession.—*Chattel Mortgage.*—A pledgee of personal property has a right to hold possession of the property pledged to him, and he can not be rightfully deprived of possession under a chattel mortgage executed after the property was pledged to him.

Deeter v. Sellers, 458

POLICE REGULATION.

See CONSTITUTIONAL LAW, 4 to 6.

PRACTICE.

See ATTACHMENT; BASTARDY; CONTINUANCE; COUNTY COMMISSIONERS, 3; CRIMINAL LAW; DEMURRER TO EVIDENCE; DRAINAGE; EVIDENCE, 5, 8; HABEAS CORPUS; INSTRUCTIONS TO JURY, 3, 4, 6, 7; LIBEL, 5; PARTIES; PARTITION; PLEADING; PROMISSORY NOTE, 3; RAILROAD, 1; RECEIVER, 2 to 5; SPECIAL VERDICT; STATUTE OF FRAUDS; SUPERIOR COURT, 2; SUPREME COURT.

1. *Pleading.*—*Harmless Error.*—It is not an available error to sustain a demurrer to a paragraph of answer setting up facts specially which are admissible under the general denial, also pleaded.

Mason v. Mason, 38

2. *Same.*—Where two paragraphs of reply, substantially alike, are directed to the same paragraph of answer, it is not an available error to sustain a demurrer to one, even if good. *Id.*

3. *Objection to Evidence.*—An objection to evidence on the ground that it is incompetent, without stating in what its incompetency consists, is too general to raise any question for the Supreme Court.

Indiana, etc., R. W. Co. v. Cook, 135

4. *Same.*—*Open and Close.*—*Appropriation of Land for Railroad.*—In a proceeding instituted by a railroad company to appropriate land for the construction of its road, on appeal to the circuit court taken by both parties by the filing by each of exceptions to the assessment of damages, the land-owner has the right to the open and close. *Id.*

5. *Same.*—*Instructions to Jury.*—When instructions taken together state the law of the case correctly, the fact that one clause therein, considered separately, is doubtful or erroneous, will not constitute ground for reversing the judgment. *Id.*

6. *Demurrer.*—*Harmless Error.*—There is no available error in sustaining a demurrer to a paragraph of pleading, if the party pleading such paragraph has in any other form the full benefit of the matters therein pleaded.

Lunta v. Greve, 175

7. *Jury Trial.*—*Verdict.*—A party upon whose demand, resisted by the other party, a cause in equity is tried by jury which should have been tried by the court, will not be permitted afterwards to question the mode of trial, and as to him the verdict will be treated in all respects as if the case were at law, and judgment entered accordingly.

Dawson v. Shirk, 184

8. *Pleading.*—*Error.*—*Demurrer.*—The overruling of a demurrer for want of sufficient facts to one bad paragraph of a complaint is a fatal error, unless it clearly appears that the judgment for the plaintiff was based upon another paragraph. *Rowe v. Peabody*, 198

9. *Joint Assignment of Error.*—A joint motion for a new trial, or a joint assignment of error, must be good as to all, or it is not good as to any.

Boyd v. Anderson, 217

10. *Same.—Attacking Complaint After Verdict.*—As to the rule to be applied when a complaint is assailed for the first time after verdict, see *Baltimore, etc., R. R. Co. v. Kreiger*, 90 Ind. 380, and *Stockwell v. State, ex rel.*, 101 Ind. 1, and cases there cited. *Id.*
11. *Notice by Publication.—Affidavit.—Case Criticised and Distinguished.*—The statute does not contemplate a full statement of the cause of action in an affidavit for publication, and an affidavit which states that there is a cause of action in the plaintiffs against the defendants, that it is connected with a contract, and that the defendants are non-residents, is not so defective as to render the notice by publication void. *Fontaine v. Houston*, 58 Ind. 316, criticised and distinguished. *Field v. Malone*, 251
12. *Failure to Assess Nominal Damages.*—A judgment will not be reversed because of a failure to assess or allow merely nominal damages. *Marsh v. Thompson*, 272
13. *Special Finding.—Request.*—Where the special finding states that "the court, at the request of the defendants, makes a special finding of facts and conclusions of law," it is not necessary that the request should appear elsewhere in the record. *Bodkin v. Merit*, 293
14. *Same.—Harmless Error.*—It is better to keep the special and general findings separate, but where no injury is done by combining them, the error will be deemed a harmless one. *Id.*
15. *Bills of Exceptions.*—Bills of exceptions must be signed by the judge and filed within the time limited. *LaRose v. Logansport Nat'l B'k*, 332
16. *Exceptions to Conclusions of Law.*—Where exceptions to conclusions of law upon facts specially found are taken before any other step in the cause by the excepting party, this is sufficient, although preceded by motions by opposite party. *Helms v. Wagner*, 385
17. *Same.*—By excepting to conclusions of law alone the facts are admitted to have been correctly found. *Id.*
18. *Evidence.—Witness.—Supreme Court.*—A mere offer to prove a fact by a witness, without asking any question to elicit it, is not sufficient to present any question to the Supreme Court upon a ruling rejecting the evidence. *Beard v. Lofton*, 408
19. *Defect of Parties.—Waiver.*—An objection on account of a defect of parties, if not taken by demurrer or answer, as provided by sections 339 and 343, R. S. 1881, is waived. *Atkinson v. Mott*, 431
20. *Special Finding.—Remedy where there is Failure to Find all Facts.—Venire de Novo.—New Trial.*—Where the special finding fails to find all the facts established by the evidence, the remedy is by a motion for a new trial, and not by a motion for a *venire de novo*. *Deeter v. Sellers*, 458
21. *Harmless Error.*—An error of the trial court in ruling upon demurrers, which runs through the record and is repeated in instructions to the jury, is not a harmless error. *Cunningham v. Evansville, etc., R. R. Co.*, 478
22. *Jury.—Misconduct of.*—Where the trial court hears affidavits and counter-affidavits upon a charge of misconduct of the jury, its decision, if supported by evidence, will not be disturbed. *Hodges v. Bales*, 494
23. *Rejection of Supplemental Complaint.—New Trial.—Supreme Court.*—The rejection of a supplemental complaint is not a cause for a new trial, but such ruling belongs to the class of cases embracing motions to strike out, to make more specific, etc., and must be presented to the Supreme Court accordingly. *Ringgenberg v. Hartman*, 537
24. *Same.—Evidence.*—Where the record fails to show what it is proposed

- to prove by a witness, there is no available error in sustaining an objection to a question propounded to him. *Ib.*
25. *Same.—Objection to Evidence.—Bill of Exceptions.*—It is not enough to state in general terms that testimony is incompetent; but the grounds of objection must be specifically stated and embodied in a bill of exceptions. *Ib.*
26. *Special Finding.—Record.*—A special finding of facts, with conclusions of law, made at the request of a party and signed by the judge, is a part of the record without an order of court. *Matthews v. Goodrich, 557*

PRESUMPTION.

See CONTRACT, 8; CRIMINAL LAW, 19; JUDGMENT, 4; JURISDICTION, 5; RECEIVER, 5.

PRINCIPAL AND AGENT.

See CONTRACT, 12; EVIDENCE, 9; REPLEVIN.

Ostensible Authority of Agent.—If a principal holds out an agent as possessing authority to control a shop or place of business, and a third person acts upon the faith of the appearances so created, the principal may be bound by the acts of such agent within the scope of such ostensible authority, although, as between the agent and his employer, no such authority in fact existed. *Over v. Schifting, 191*

PRINCIPAL AND SURETY.

See JUSTICE OF THE PEACE; MARRIED WOMAN; PROMISSORY NOTE, 4, 5.

1. *Contract of Surety.*—The engagement of a surety is a direct original agreement with the obligee that in the event his principal fails, he will perform the original obligation; and whether it is entered into jointly with the principal or separately, the extent and character of the obligation are the same as to both, depending only upon the form in which it is expressed. *La Rose v. Loganport Nat'l Bank, 332*
2. *Same.—Contract of Guaranty.*—The contract of obligors, whether entered into separately or jointly with the principal, if by its terms it appears that the principal is separately bound by an original, independent contract, to which the contract for security is collateral, and the obligors agree therein that the principal will pay or perform according to his original engagement, and that they will answer for his default in the event of failure, is a contract of guaranty. *Ib.*
3. *Same.—Bond of Bank Cashier is Contract of Guaranty.*—The contract of the sureties in the bond of a bank cashier, conditioned for the faithful discharge of his duties by such cashier, is a contract of guaranty. ELLIOTT, J., and ZOLLARS, J., dissent from this proposition. *Ib.*
4. *Same.—Notice of Default.—Matter of Defence.*—A failure to give notice to guarantors of the default of their principal, except in cases governed by commercial rules, is a matter of defence, and resulting damages must concur with such failure in order to work a discharge. *Ib.*
5. *Same.—Complaint.—Failure to Aver Notice of Default.*—A complaint upon a contract of continuing guaranty is not subject to demurrer because of its failure to aver notice of the default. *Ib.*
6. *Same.—Liability of Cashier.—Access to Funds by Others.*—Where by a by-law of a bank its cashier is made responsible for the funds and valuables of the bank, it can not be implied that his bond would not become operative until all the other officers and employees were denied access to such funds and valuables, nor that he is responsible for losses which may occur through the delinquencies of others. *Ib.*
7. *Same.—Consideration.—Approval of Bond after Appointment.*—The bond of a bank cashier, executed and approved two weeks after he enters

upon his duties, is upon sufficient consideration, and is operative, at least from the date of its approval. *Ib.*

8. *Same.—Knowledge by Employer of Misconduct of Employee.—Release of Guarantor.*—The knowledge by an employer of the misconduct of an employee, whose conduct and fidelity have been guaranteed by another, which will, if concealed, release the guarantor, must relate to the service in which the employee is engaged, and must be something more than mere moral delinquency, unconnected with the subject-matter of the guaranty. *Ib.*
9. *Same.—Revocation of Guaranty.*—A continuing contract, guaranteeing the fidelity of a bank cashier, may be revoked by the guarantors without cause, upon proper notice, but the right must be exercised reasonably. *Ib.*

PRIVILEGED COMMUNICATION.

See CONTINUANCE; EVIDENCE, 1; LIBEL, 1; WITNESS, 2.

PROMISSORY NOTE.

See INSTRUCTIONS TO JURY, 5; MARRIED WOMAN; SCHOOLS, 5 to 8; SCHOOL COMMISSIONERS, 1, 4.

1. *Consideration.—Failure of.—Pleading.*—To a complaint upon a promissory note, an answer that the sole consideration was the conveyance by deed, with covenants, of a tract of land to which the plaintiff had no title whatever, but falsely and fraudulently represented that he had a good title, which he knew to be false, upon which the defendant relied, is bad on demurrer. *Grubbs v. Barber, 131*
2. *Joint Makers.—Consideration.—Separate Defence.—Answer.*—One of the joint makers of a promissory note can make the defence that as to him such note is without consideration, and an answer by him, admitting the signing of the note, but alleging that "as to him it was executed without any consideration whatever," is good. *Anderson v. Meeker, 31 Ind. 245, and Bingham v. Kimball, 33 Ind. 184, distinguished. Moyer v. Brand, 301*
3. *Same.—Pleading.—Practice.—Harmless Error.*—If a separate answer by one of several defendants goes to the merits of the case, and is such that the proof of it will defeat a recovery by the plaintiff, it will enure to the benefit of the other defendants; but this rule will not render harmless an error in sustaining a demurrer to an answer by one of such other defendants who has the right to answer and defend separately. *Ib.*
4. *Surety.—Forged Signature.—Acceptance without Notice.*—When the name of one of two or more obligors on a note is forged, the supposed co-obligor, though a surety only, and though he signed in the belief that the forged name was genuine, is nevertheless bound, if the payee accepted the note without notice of the forgery. *Hunter v. Fitzmaurice, 449*
5. *Same.—Agency.*—The fact that the maker of a note, at the mutual desire and request of the proposed payee and surety, takes it to obtain the signature of an additional surety, does not constitute him the agent of such payee. *Ib.*
6. *Same.—Innocent Parties.*—Where one of two innocent parties holds the legal obligation of the other, and the law can not divide the loss, he is in the situation of advantage who holds the obligation. *Ib.*

PROSTITUTION.

See CRIMINAL LAW, 3 to 6.

PUBLIC POLICY.

See MECHANIC'S LIEN.

QUIETING TITLE.

See TAXES, 9.

Effect of Decree.—Evidence.—A decree quieting title cuts off all liens not protected by proper provisions in the decree, and in order to prevent this result a defendant in a suit to quiet title has a right to prove the character of a lien held by him. *Watkins v. Winings, 330*

RAILROAD.

See MASTER AND SERVANT; NEGLIGENCE; PRACTICE, 4.

1. *Animals.—Fencing.—Complaint.—Defect Cured by Verdict.*—In a complaint against a railroad company to recover the value of stock killed, it is necessary, to be good on demurrer, to aver that the railroad was not fenced at the point where the animals entered; but where, instead of such averment, it is alleged that the road was not fenced at the point where the animals were killed, the defect is cured by verdict. *Louisville, etc., R. W. Co. v. Goodbar, 596*
2. *Same.—Private Gate.—Animals Entering Upon Track by.*—A railroad company is not liable to pay for animals that enter upon its track through a gate maintained by the owner for his own accommodation. *Id.*

REAL ESTATE.

See DECEDENTS' ESTATES, 1 to 3; DEED; DRAINAGE; FRAUDULENT CONVEYANCE; HUSBAND AND WIFE; JURISDICTION, 3; LANDLORD AND TENANT; MARRIED WOMAN, 3 to 7; PARTITION; PARTY WALL; QUIETING TITLE; REAL ESTATE, ACTION TO RECOVER; SHERIFF'S SALE; SWAMP LANDS; TRUSTS; VENDOR AND PURCHASER; WILL.

Title to.—Evidence.—Color of Title.—A party in possession has a right to give in evidence a sheriff's deed although the decree on which it is founded may not be valid, for a void deed may give color of title.

Watkins v. Winings, 330

REAL ESTATE, ACTION TO RECOVER.

See HUSBAND AND WIFE; SUBROGATION, 3; SWAMP LANDS.

1. *Tenants in Common.—Eviction.—Undivided Interest.—Right to Recover.*—One tenant in common who is wrongfully evicted by a cotenant may maintain an action of ejectment to recover his undivided share of the land. *Frakes v. Elliott, 47*
2. *Same.—Statute of Limitations.*—In actions for the recovery of the possession of real estate, the statutory limitation is twenty years. *Id.*

RECEIVER.

See JUDGMENT, 3; SHERIFF'S SALE, 2.

1. *Jurisdiction.—Judge in Vacation.*—A judge can exercise in vacation only such limited powers as may be specially granted by statute, and his jurisdiction must affirmatively appear of record. *Fressley v. Harrison, 14*
2. *Same.—Appointment of.*—If a judge in vacation may appoint a receiver where no process has issued and no appearance has been made to an action, but the person named as defendant in a complaint has voluntarily appeared to a motion made before the judge for the appointment of a receiver, still a judge has no power to make such an appointment, where, because of the want of the issue of process and the want of an appearance, no action is pending, and such defendant has not himself appeared, in person or by attorney, to such motion. *Id.*
3. *Same.—Appearance.—Plaintiff Can Not Appear for Defendant.*—The filing and delivery to the judge by the plaintiff of papers purporting to be signed by the defendant can not constitute an appearance by the defendant to the action or to the plaintiff's motion for a receiver. *Id.*

4. *Same.—Partners.—Mutual Request for Receiver.*—A receiver can be appointed only in a proceeding where there are adverse parties. Partners can not, without any suit pending between them, obtain the appointment of a receiver of their property by their mutual request therefor, one putting his request in the form of a complaint against the other, and the latter his consent in the form of an answer to such complaint. *Ib.*
5. *Same.—Collateral Attack.*—Where, from an inspection of the record, it affirmatively appears that no jurisdiction of the person was acquired, no presumption in favor of the judgment as against a collateral attack will be indulged. *Ib.*

REDEMPTION.

See MORTGAGE, 1; SHERIFF'S SALE; TAXES, 8 to 10.

REFORMATION OF DEED.

See DEED, 4, 5; VENDOR AND PURCHASER, 4.

RENT.

See LANDLORD AND TENANT, 1; SHERIFF'S SALE.

REPLEVIN.

See JUSTICE OF THE PEACE.

Demand.—Agent.—Where there is a tortious taking of personal property, no demand is necessary, but, where a demand is necessary, it is sufficient to make it of the agent in possession of the property.

Deeter v. Sellers, 458

RES ADJUDICATA.

See DECEDENTS' ESTATES, 1, 2; HIGHWAY, 4; PARTITION, 1; PLEADING, 12; TRESPASS, 4.

Decision on Former Appeal.—The general rule is that a decision on appeal governs the case throughout all its subsequent stages, but this rule does not apply to merely incidental or collateral questions; it applies to such questions only as were presented for decision, and were decided as essential to a just disposition of the pending appeal.

Union School Township v. First Nat'l Bank, 464

RESERVATION.

See VENDOR AND PURCHASER, 3.

RESPONDEAT SUPERIOR.

See CITY, 5; MASTER AND SERVANT.

REVOCATION.

See PRINCIPAL AND SURETY, 9.

RIGHTS AND REMEDIES.

See SHERIFF'S SALE, 5.

RULE OF COURT.

See CHANGE OF VENUE, 1.

SALE.

See CONSTITUTIONAL LAW, 3; DECEDENTS' ESTATES, 1 to 3; SHERIFF'S SALE; SUBROGATION; TAXES.

SCHOOL COMMISSIONERS.

1. *City.—School Commissioners in Cities of 30,000.—Powers of.—Statute Construed.*—The 5th clause of section 4460, R. S. 1881, gives to boards of school commissioners in cities of 30,000 or more inhabitants, power to contract for the erection and completion of school-houses, and to

agree to pay therefor partly in cash and partly on time, and to make and deliver their promissory notes for the deferred payments, which are valid obligations, and binding upon the school corporation, notwithstanding the fact that there may be at the time outstanding bonds to the amount of \$100,000, issued and sold under the 8th clause of said section, to secure loans in anticipation of the revenue, for building school-houses, and that such money had been disbursed for that purpose.

Fatout v. Board of School Comm'rs, etc., 223

2. *Same.—Discretion of Commissioners.*—The powers conferred upon such board by the 5th clause of section 4460 are limited only by the educational wants of the school corporation under the board's control, in the exercise of a sound and reasonable discretion. *Id.*
3. *Same.*—The 8th clause of section 4460, R. S. 1881, was not intended to be and is not a limitation upon the general powers conferred upon the board of school commissioners by the 5th clause of such section. It confers additional and extraordinary power not conferred upon school corporations generally, and the proviso therein contained is a limitation only upon the board's exercise of such additional and extraordinary power. *Id.*
4. *Same.—Promissory Notes.*—Promissory notes executed by such board of school commissioners, in settlement of its just debts fairly contracted for the legitimate purposes of the school corporation, do not come within the purview of the 8th clause of section 4460, R. S. 1881, or of the proviso thereof. *Id.*

SCHOOL-HOUSE.

See MECHANIC'S LIEN; SCHOOL COMMISSIONERS, 1.

SCHOOLS.

See SCHOOL COMMISSIONERS; TOWNSHIP TRUSTEE.

1. *Constitutional Law.—Taxation.—Statute.*—The statute empowering the school trustees of cities to levy a tax for tuition purposes is constitutional. *Robinson v. Schenck, 307*
2. *Same.—Local Taxation.—Uniformity of Statutes.—General Laws.—Delegation of Power.*—It is competent for the Legislature to delegate the power of assessing taxes for local school purposes to the inhabitants of the various localities, but the provisions of the law providing for such local taxation must be open to all school corporations of like character, and the statute must be general in its nature and operation. *Id.*
3. *Same.—Legislative Power.*—The provision of the Constitution, art. 8, sec. 1: "Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government, it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement, and to provide, by law, for a general and uniform system of common schools, wherein tuition shall be without charge, and equally open to all," does not require the Legislature to levy all school taxes, nor prohibit it from providing, by a general law, for the levying of school taxes by the local school authorities. *Id.*
4. *Same.—General Laws.—Uniform System of Schools.*—A system that secures to all the various subdivisions of the State equal and uniform rights and privileges, leaving only to the local authorities the right, under the law, to govern the local school affairs, is a general and uniform system, and a law providing such a system is a general law within the meaning of the Constitution. *Id.*
5. *Corporation.—Promissory Note.—Bank.—Deposits.*—Where the trustee of a school corporation executes promissory notes in the name of the

corporation, deposits the money in his own name, and draws it out upon checks signed by himself as an individual, he becomes the creditor of the bank for such deposits, and the transaction is one between the bank and its depositor. *Union School Tr'p v. First Nat'l Bank*, 464

6. *Same.—Authority of Trustee to Borrow Money.*—The trustee of a school corporation has no authority to borrow money and execute promissory notes therefor in the name of the corporation. *Ib.*
7. *Same.—Liability of Corporation.—Subrogation.*—Where the school trustee borrows money and executes notes therefor in the name of the school corporation, the corporation will be liable if the money is actually used for the payment of legitimate claims against the corporation, and the circumstances are such as make it equitable that the lender should be subrogated to the rights of the persons whose claims the borrowed money paid. *Ib.*
8. *Same.—No Liability where Trustee has School Funds in his Hands.—Subrogation.*—Where the trustee has money in his hands derived from the school revenues or funds, the lender of money can not be subrogated to the rights of the persons holding claims against the school corporation. *Ib.*
9. *Same.—Authority of School Trustee Statutory.—Duty of Persons Dealing with Him to Ascertain the Extent of his Authority.*—A school corporation is one of very limited powers; the authority of the trustee is purely statutory, and all who deal with him must, at their peril, ascertain the extent of his authority. *Ib.*
10. *Same.—Estoppel.—Public and Private Corporations.*—There is an essential difference between public and private corporations, for the officers of the former, exercising statutory powers, can not bind the corporation by estoppel where the acts relied upon as creating the estoppel are beyond the scope of the authority vested in such officers. *Ib.*

SECRET SOCIETY.

See INSURANCE.

SEDUCTION.

1. *Complaint.—Previous Chastity.—Reliance on Promises.*—Averments of previous chastity, or good repute for chastity, and that the plaintiff relied on the defendant's promises, are not essential in a complaint by an unmarried woman for her own seduction. *Hodges v. Bales*, 494
2. *Same.—Averments as to Means of Seduction.*—A complaint alleging, substantially, that the defendant was the plaintiff's suitor, and that by his attentions and professions of affection he gained her confidence and importuned and persuaded her to have sexual intercourse with him, and that she, by reason of her confidence in and love for him, yielded, etc., and, also, that by promising to marry plaintiff the defendant seduced and debauched her, sufficiently describes the means of the seduction. *Ib.*
3. *Same.—Coercion.—Demurrer.*—That it remains uncertain from a paragraph of complaint, whether the intercourse was had by means of force or by arts which amount to seduction, or both combined, is not ground for demurrer. *Ib.*
4. *Same.—Evidence.*—For a consideration of evidence held sufficient after verdict to support a charge of seduction, notwithstanding an element of coercion, see opinion. *Ib.*

SET-OFF.

See LANDLORD AND TENANT, 1; SHERIFF.

SEWERS.

See CITY.

SHELLEY'S CASE.

See DEED, 1.

SHERIFF.

See SHERIFF'S SALE; SUBROGATION.

Subrogation.—Offset.—Judgment.—Void Execution.—Where a sheriff, upon a void execution, collects the amount of a valid judgment and pays it over to A., the judgment plaintiff, and subsequently the judgment defendant obtains a judgment against such sheriff for the recovery of the money so collected, such sheriff is subrogated to the rights of A., and is entitled to offset that judgment against the one against him, or to have execution upon it, at his option. Sec. 1214, R. S. 1881.

Gillette v. Hill, 531

SHERIFF'S SALE.

See MORTGAGE, 1, 3; SUBROGATION.

1. *Redemption of Real Estate.—Landlord and Tenant.—Rents, Right to.—Statute Construed.*—A. and wife executed a mortgage to B. in 1878, upon real estate. The mortgage was foreclosed and the land sold in 1880. The purchaser transferred the sheriff's certificate to C. A short time before the foreclosure, A. had given to his wife, for her own use, the rents of a mill situated upon the mortgaged land. Before the foreclosure also, the wife leased the mill to D. After C. became the owner of the certificate he notified D. to pay the rent to him, which he did thereafter. The land not having been redeemed, C. procured a sheriff's deed in 1882. Action by the wife against D. for the rent during the year allowed for redemption.

Held, that the redemption law of 1861, in force when the mortgage was executed, entered as a silent factor into, and became a part of, the contract between A. and B., and that a subsequent law will not be allowed to materially alter or affect their rights under the contract.

Held, also, that under the redemption law of 1861, the tenant, D., would not have been liable to C., but to the wife, for the rent; but under the redemption law of 1879, D. was liable to C.

Held, also, that the liability of D. was fixed by the law of 1879, and under that law he was liable to C., the owner of the sheriff's certificate, and not to the wife of A. That law made him the tenant of C.

Bryson v. McCreary, 1

2. *Same.—Object of Redemption Law of 1861.—Receiver.*—The main object of the redemption law of 1861 was to enable the judgment debtor, by the use of the rents and profits, to redeem his property, and at the same time save the purchaser from loss, and hence the proviso that if the premises were not redeemed, the judgment debtor should be accountable to the purchaser for the reasonable rents and profits; and hence, too, the rulings that in certain cases a receiver would be appointed to collect the rents and hold them for the purchaser in case the premises were not redeemed. *Ib.*

3. *Same.—Redemption Law of 1879.*—The main object of the law of 1861 was accomplished by the law of 1879, by requiring the judgment debtor, if he occupied the premises and did not redeem, to account to the purchaser for the reasonable rents, and by allowing the purchaser to collect the reasonable rents in the first instance from other occupants of the premises, and keep them if the premises were not redeemed, and if they were redeemed, to allow a credit on the judgment for the amount collected. This additional authority on the part of the purchaser to collect the rents operated in the way of security. *Ib.*

4. *Same.—Statute of 1879 does not Violate Obligation of Contracts.—Constitutional Law.*—The redemption law of 1879 did not violate the obligations of the contract between A. and B., but secured its more faithful

performance. It may be, therefore, more properly styled a statute affecting and providing a more efficient remedy for the enforcement of the contract between the parties. *Ib.*

5. *Same.—No Vested Rights in Laws or Legal Remedies.*—There are no vested rights in the laws generally, nor in legal remedies, and hence changes therein by the Legislature do not fall within the constitutional inhibition, unless they are of such a character as to materially affect the obligation of contracts; and hence, too, laws which merely afford the means for a more efficient enforcement of a contract do not impair its obligation, and are valid. *Ib.*

SLANDER.

See LIBEL.

SPECIAL VERDICT.

1. *Facts not Found.*—Facts not found in a special verdict are to be regarded as not proved by the party having the burden of proof. *Parmater v. State, ex rel., 90*
2. *Pleading.*—A party can not recover on a cause of action in his favor shown by a special verdict, under an issue involving only a different cause of action. *Hasselman v. Carroll, 153*
3. *Judgment.—Damages.*—Where a special verdict states the amount of damages found for the plaintiff, in the event that, upon the facts found, the law is for the plaintiff, and no data are furnished by the verdict from which the court can, by computation, ascertain the damages, judgment, if for the plaintiff, must be for the damages found by the jury. *Aliter, if there be data found by the verdict, which will enable the court to compute the proper damages. Dawson v. Shirk, 184*

SPECIAL FINDING.

See PRACTICE, 13, 14, 16, 17, 20, 26; SPECIAL VERDICT.

STARE DECISIS.

See CONSTITUTIONAL LAW, 2.

STATUTE.

See CITY, 3; CONSTITUTIONAL LAW; CRIMINAL LAW, 2, 3, 5 to 7, 14, 16, 27, 35; DECEDENTS' ESTATES, 3; DRAINAGE, 1, 2, 3, 4; HIGHWAY, 1 to 3; MARRIED WOMAN, 5; PARTITION, 2; PLEADING, 6; PRACTICE, 11, 19; RECEIVER, 1; SCHOOLS, 1, 2, 9; SCHOOL COMMISSIONERS; SHERIFF; SHERIFF'S SALE; SWAMP LANDS; TAXES, 4, 6, 8 to 10; TELEGRAPH COMPANY.

STATUTE CONSTRUED.

See CRIMINAL LAW, 2; HIGHWAY, 2; SCHOOL COMMISSIONERS; SHERIFF'S SALE

STATUTE OF FRAUDS.

See CONTRACT, 13.

Defence is a Personal One.—The defence of the statute of frauds is a personal one and can not be made by strangers to the transaction.

Bodkin v. Merit, 293

STATUTE OF LIMITATIONS.

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1. *Sheriff's Sale.*—A purchaser at a sheriff's sale upon an invalid decree

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2. *Same.—Volunteer.*—A purchaser at an invalid sheriff's sale is not a volunteer. *Ib.*
 3. *Same.—Former Adjudication.—Mandate.*—A judgment against a purchaser at an invalid sheriff's sale, upon an application for a mandate to compel the sheriff to execute a deed, is not an adjudication upon the purchaser's right to subrogation. *Ib.*
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1. *Superior Court of Vigo County.—Jurisdiction.*—Query, whether the superior court of Vigo county has jurisdiction over the judgments and process of the circuit court of that county. *Rogers v. Beauchamp*, 33
2. *Marion Superior Court.—Appeal.—Assignment of Error.—Practice.*—On appeal from the general term of the Marion Superior Court to the Supreme Court, only such errors as were assigned in such general term will be considered. *Rotach v. McCarty*, 461

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- See ATTACHMENT, 1; CHANGE OF VENUE, 2; CRIMINAL LAW, 19, 30, 55, 56; DAMAGES, 4; LIBEL, 5; PLEADING, 1, 9; PRACTICE, 3, 9, 10, 12, 13, 18, 23, 25; RES ADJUDICATA; SUPERIOR COURT, 2.
1. *Appeal.*—Where, on appeal, it appears from the record that the appellant, the plaintiff below, was not entitled to recover anything, rulings of the trial court, though erroneous, will be considered harmless and not available for the reversal of the judgment. *Mason v. Mason*, 38
 2. *Practice.—Bill of Exceptions.*—Where exceptions to a guardian's report have been disallowed upon evidence, the ruling can not be questioned in the Supreme Court in the absence of a bill of exceptions containing the evidence. *Angevine v. Ward*, 291
 3. *Weight of Evidence.*—Where there is evidence tending to sustain the verdict, the Supreme Court will not disturb it on the weight of the evidence. *Crocker v. Hadley*, 416
 4. *Assignment of Error Attacking Complaint.—Practice.*—An assignment of error in the Supreme Court, that the complaint does not state sufficient facts to constitute a cause of action, questions the entire complaint, and if any paragraph is sufficient such assignment can not be sustained. *Stout v. Turner*, 418
 5. *Same.—Sufficiency of Evidence.*—When all the evidence is not in the record, the Supreme Court can not pass upon its sufficiency. *Ib.*
 6. *Same.—Practice.—Bill of Exceptions.—Omitted Evidence.*—A general statement in a bill of exceptions that it contains all the evidence is controlled by an affirmative showing to the contrary. *Ib.*
 7. *New Trial.—Assignment of Error.*—Overruling a motion for a new trial, assigning as cause therefor error in sustaining a demurrer to an answer, when assigned for error in the Supreme Court, presents no question on such answer. *Hunter v. Fitzmaurice*, 449
 8. *Practice.—Evidence.*—The Supreme Court will not weigh conflicting evidence, but will accept that deemed credible by the trial court, and will apply the law to the facts established by such evidence. *Union School Tp. v. First Nat'l Bank*, 464

9. *Same.—Petition for Rehearing.*—Points not made on the original argument will not be considered on the petition for a rehearing. *Ib.*
10. *Brief.*—A paper giving what is denominated "a history of the case," and stating that "appellants contend that the sheriff's sale was not completed till July 7th, 1882," is not a brief. *Liggett v. Firestone, 514*
11. *Same.—Duty of Counsel.*—It is the duty of counsel to do more than make assertions; they should state reasons for their propositions, and, if necessary, cite authorities in their support. *Ib.*
12. *Sufficiency of Evidence.*—Where there is evidence in the record which tends to sustain the finding of the trial court on every material point, the Supreme Court will not disturb it. *Western U. Tel. Co. v. Huff, 535*
13. *Assignment of Error.—Practice.*—An assignment of error, that "the court erred in overruling the demurrers to the first, second and third paragraphs of the complaint," does not call in question the rulings upon demurrers to each of the paragraphs separately, but all jointly, and if one is good the assignment fails. *Ketcham v. Barbour, 576*
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See MARRIED WOMAN; PRINCIPAL AND SURETY; PROMISSORY NOTE, 4, 5.

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See DECEDENTS' ESTATES, 3.

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1. *Treasurer's Certificate Evidence of Legal Title.*—Under section 11 of the act of the State Legislature to regulate the sale of swamp lands, etc., approved May 29th, 1852, 1 G. & H. 599, the county treasurer's certificate of entry is evidence of legal title to the land mentioned therein in the person in whose name it is issued. *Matthews v. Goodrich, 557*
2. *Same.—Act of Sept. 28th, 1850, is Grant In Presenti.*—By the act of Congress of Sept. 28th, 1850, R. S. of U. S., section 2479 (see 1 G. & H., p. 737), the whole of the swamp and overflowed lands within this State, made unfit thereby for cultivation, which remained unsold at the passage of that act, were granted to this State, and such act was a grant in presenti. *Ib.*
3. *Same.—Patent.—Selection of Lands.—Evidence.*—The fact that a patent was subsequently issued to this State by the United States is conclusive evidence that the lands embraced therein were selected for the State, as swamp lands, and that the selection was approved by the proper authority, and establishes title to such lands in this State, commencing on Sept. 28th, 1850. *Ib.*
4. *Same.—Relinquishment by State.—Title of State's Grantee.*—The State has never relinquished to the United States its title to the lands so patented, and evidence of a title, to any of such lands, derived from the United States, subsequent to Sept. 28th, 1850, is of no avail against a title acquired from the State under the swamp land act. *Ib.*
5. *Same.—Invalid Release by Governor.*—The attempted release or conveyance, by the Governor of this State to the United States in 1859, of certain of such lands, was without authority and invalid. *Ib.*
6. *Same.—When State's Grantee May not Question Title from United States.*—The State's grantee is only estopped from questioning a title derived from the United States to particular lands of those granted by the swamp land act of 1850 for which the State received compensation instead of the lands. *Ib.*

TAXES.

See SCHOOLS, 1 to 4.

1. *Sale.—Injunction.—Pleading.—Tender.—Payment.—Equity.*—A complaint to enjoin the issue of an auditor's deed upon an illegal sale of lands for taxes, which fails to aver a tender and to make an offer to pay the lawful taxes to the defendant, is bad on demurrer.
Rowe v. Peabody, 198
2. *Void Sale.—Transfer of Lien.*—A purchaser at a tax sale may acquire a lien although the sale is void.
Watkins v. Winings, 330
3. *Same.—Subrogation.*—Where a sale made on a decree foreclosing a lien for taxes is void, the purchaser at such sale will be subrogated to the rights of the lien-holders.
Ib.
4. *Sale.—Charging Wife's Land in Name of Husband.*—Under the tax laws of 1872, and, also, of 1881, the fact that a wife's land is charged on the tax duplicate in the name of the husband, would not invalidate a sale of such land for taxes.
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5. *Same.—Personal Property.*—A sale of land for taxes, without first exhausting personal property, is invalid.
Ib.
6. *Same.—Interest.*—Under sections 3 and 4 of the amendatory act of March 5th, 1883, a purchaser of land for taxes under the act of December 21st, 1872, where the title proves invalid, is only entitled to a lien for the purchase-money and all subsequent taxes paid by him, with interest thereon at the rate of twenty per centum.
Ib.
7. *Sale.—When Void.—Personal Property.*—A sale of real estate for taxes, while the owner has available personal property subject to distress and sale, is illegal and void.
Michigan Mut. L. Ins. Co. v. Kroh, 515
8. *Sale.—Tender within Time for Redemption.—Deed.—Interest.*—Under sections 227 and 254, 1 R. S. 1876, pp. 124, 128, where an invalid and void sale for taxes has been made, if the land-owner, within the time for redemption and before a deed has been issued to the purchaser, tendered to the proper officer all legal taxes due, together with the lawful interest and charges thereon, a deed subsequently issued would not entitle the purchaser to recover the twenty-five per cent. interest provided for in section 257 of the same act. *Altier*, if no tender had been made within the proper time.
Ib.
9. *Same.—Quieting Title.*—In such case, the land-owner might quiet his title against the holder of such deed by averring and proving the illegality of the sale, the tender and bringing of the money into court for the benefit of the purchaser.
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TAX SALE.

See TAXES.

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Western U. Tel. Co. v. Walker, 599
2. *Same.—Complaint.*—It is not necessary that the exact words of the statute should be used in the complaint; it is sufficient if words of equivalent meaning are employed.
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TOWNSHIP TRUSTEE.

See SCHOOLS, 5 to 10.

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2. *Same.—Action for Damages.—Pleading.—Fences.—Negligence.*—Where there is no such order, it is not necessary, in an action to recover for injuries done by trespassing animals, to allege or prove the existence of a lawful fence, nor to allege that the defendant was negligent and the plaintiff without fault, nor to allege that the damages are due and unpaid. *Ib.*
3. *Same.—Husband and Wife.—Parties.*—Where such an action is brought by a married woman for injuries to her property, the husband may be joined as plaintiff, although he is not a necessary party. *Ib.*
4. *Same.—Recovery by One Joint Owner.—Res Adjudicata.*—In such case, if the wife is a joint owner with her co-plaintiff, a recovery by her for the entire damage done would bar another action by her or her husband for the same subject-matter. *Ib.*

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END OF VOL. 102.

Ev. by A. L.

6-125-99



